

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION



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DECISIONS

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The following cases were directed for review during the month of August:

Secretary of Labor, MSHA v. U.S. Steel Mining Company, Inc., Docket No. PENN 83-129. (Judge Koutras, July 11, 1984)

Robert Roland v. Secretary of Labor, MSHA, Docket No. WEST 84-46-DM(A). (Judge Melick, Interlocutory Review of July 3, 1984 order)

United Mine Workers of America on behalf of James Rowe, et al. v. Peabody Coal Company, Docket Nos. KENT 82-103-D, etc., and Secretary of Labor on behalf of Thomas Williams v. Peabody Coal Company, Docket No. LAKE 83-69 (Judge Merlin, July 11, 1984 and August 3, 1984)

Secretary of Labor on behalf of Paul Sedgmer and others v. Consolidation Coal Company, Docket No. LAKE 82-105-D. (Judge Moore, July 16, 1984)

Secretary of Labor, MSHA v. Pyro Mining Company, Docket No. KENT 84-151. (Judge Steffey, July 26, 1984)

United Mine Workers of America, Local 2274 v. Clinchfield Coal Company, Docket No. VA 83-55-C. (Judge Moore, July 23, 1984)

No cases were filed in which review was denied during the month of August

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

August 23, 1984

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

S. STEEL MINING COMPANY, INC.

:
:
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: Docket No. PENN 83-39
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:
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DECISION

The issue presented here is whether a Commission administrative law judge correctly held that two violations of mandatory safety standards were "significant and substantial" within the meaning of 30 U.S.C. § 814(d)(1), section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act"). We affirm.

The facts of the case are as follows. In August 1982, Inspector Robert E. Whipple of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to U.S. Steel Mining Company ("USSM") nine citations under section 104(a) of the Mine Act. 30 U.S.C. § 814(a). The citations were issued at USSM's Cumberland Mine located in Greene County, Pennsylvania, in addition to alleging a violation of a mandatory safety standard, each of the nine citations also alleged that the cited violation was significant and substantial ("S&S").

Thereafter, the Secretary of Labor filed with this independent Commission a proposal for assessment of civil penalties for the nine alleged violations. A hearing was held during which the S&S designations in two of the citations were deleted and a third citation was vacated by the Commission administrative law judge at the Secretary's request. USSM admitted the eight remaining violations, but contested the inspector's significant and substantial findings to six of them, and the penalty amounts proposed by the Secretary. The judge then held that the six violations were significant and substantial and assessed penalties. 5 FMSHRC 1728 (October 1983)(ALJ).

We subsequently granted USSM's petition for review of the judge's decision, but only for two of the violations found to be significant and substantial. One of the violations before us on review (citation 201206)

roadway. The primary issue as to each violation is whether substantial evidence supports the judge's significant and substantial findings. Preliminary to our addressing the merits of the case, we briefly set forth the interpretation that we have accorded the statutory term, significant and substantial.

Section 104(d)(1) of the Mine Act provides:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act....

30 U.S.C. § 814(d)(1) (emphasis added). Section 104(e) of the Act, 30 U.S.C. § 814(e), contains similar significant and substantial language.

The Commission first interpreted this statutory language in Cement Division, National Gypsum Co., 3 FMSHRC 822 (April 1981). There we held:

...[A] violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.

3 FMSHRC at 825 (emphasis added). In Mathies Coal Company, 6 FMSHRC 1 (January 1984), we reaffirmed the analytical approach set forth in National Gypsum, and stated:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

o "hazard" in the second element is simply a recognition that the violation must be more than a mere technical violation -- i.e., that the violation present a measure of danger. See National Gypsum, supra, 3 FMSHRC at 827. We also note that our reference to hazard in the third element in Mathies contemplates the possibility of a subsequent event. This requires that the secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury. The fourth element in Mathies requires that the potential injury be of a reasonably serious nature. Finally, in U.S. Steel Mining Co., Inc., PENN 82-336 (July 11, 1984), we recently reemphasized our holding in National Gypsum that the contribution of the violation to the cause and effect of a mine safety hazard is what must be significant and substantial.

Citation No. 2012065

On August 4, 1982, MSHA Inspector Newhouse issued a citation to USSM upon observing that the electrical plugs (also referred to as "disconnecting devices") for the trailing cables on a continuous mining machine and a shuttle car were not properly tagged, or otherwise identified, to correspond with the receptacles at the mine section's power center. The citation alleged a violation of 30 C.F.R. § 75.601, which provides in relevant part:

Disconnecting devices used to disconnect power from trailing cables shall be plainly marked and identified and such devices shall be equipped or designed in such a manner that it can be determined by visual observation that the power is disconnected.

At the time that the citation was issued, there were three pieces of mining equipment in the mine section -- the cited continuous mining machine and shuttle car, as well as a second shuttle car. The trailing cable plug to the second shuttle car was properly identified.

In finding the violation to be significant and substantial the judge stated, "The hazard resulting from the violation is that someone could contact an energized cable thinking it was disconnected, or could inadvertently plug in the wrong cable." 5 FMSHRC at 1731. The judge reasoned that although the trailing cable plugs to the continuous mining machine and the shuttle car were "very different in size and appearance and could not be confused with one another," 1/ the unmarked shuttle car trailing cable plug could be confused with the trailing cable of the other shuttle car that was on the section when the citation was issued. Id. In addition, the judge noted that although the power center into which the trailing cables are plugged has a keying system that physically prevents a plug from being inserted into the wrong receptacle, "the keys are often taken off the cables, and it is not known whether the keys were present on the day the citation was issued." 5 FMSHRC at 1731.

argues only that the record does not support the judge's implicit holding that there was a reasonable likelihood of such an electrical incident and resulting injury occurring. National Gypsum, supra. We disagree.

The electrical hazard is presented because a miner could mistake the unmarked shuttle car trailing cable plug for the plug of another shuttle car or for a similar looking plug of a different piece of equipment and insert that plug into the power center. Inspector Newhouse described the hazard as the "[p]ossibility of somebody coming in contact with the energized cables, either through repair of a cable or whatever reason; somebody inadvertently plugging in the wrong cable." Tr. 57. The inspector described the scenario as follows:

[S]ay you have the shuttle car; say there is electrical problems with it. An electrician comes in and he is in a hurry and he gets in the cable. He just unplugs it because he has to check something. You know, somebody else may be fooling around with a fan cable, or whatever; and somebody is told to go up and put the power on. They see that cable and they plug it in. The man is in a hot circuit.

Tr. 80. In fact, a fatal accident had occurred at the Cumberland Mine in January 1979, involving trailing cables. At that time two crews of mechanics were working on two shuttle cars that were down for repairs on the same mine section. One of the mechanics was electrocuted when the crews mixed up the two trailing cables and a miner, believing that he was plugging in the repair shuttle car cable, plugged in the cable to the other (unrepaired) shuttle car instead. The miner electrocuted was working on the bare power wires of the cable that was plugged into the power center. 2/

As to the likelihood of such an occurrence, the inspector stated, "It is very probable it could occur with the number of cables and the number of power conductors in that mine." Tr. 63 (emphasis added). 3/ Moreover, as

2/ USSM argued that the events resulting in the January 1979 fatal accident could not reoccur because of the subsequent addition to the electrical system of a device referred to as a "FEMCO" unit. Robert Bohack, a USSM safety engineer, testified that the FEMCO unit is a tamper-proof device that prevents the by-passing of the trailing cable's ground continuity system (apparently a major cause of the January 1979 fatal accident). Although Inspector Newhouse appeared to take issue with Bohack's testimony regarding the FEMCO unit, the judge made no specific finding on this point. Nevertheless, relying on the testimony of Bohack, the judge stated, "If a break occurs in a power lead, the power would be cut by the ground continuity check. However, it is possible to have a bare wire not cut without interrupting the continuity

time that the citation was issued thus increasing the likelihood of a trailing cable mix-up. Inspector Newhouse indicated that it would not be unusual for two shuttle cars on the same mine section to be down for repairs at the same time. He estimated that such an event could occur at twice a month. The inspector also testified that a trailing cable mix-up could occur in the event of an emergency, such as a cable fire. In that case, the inspector stated, a miner would not have enough time to determine to which piece of machinery the unmarked trailing cable plug belonged.

USSM safety engineer Bohack testified that it was not reasonably likely that the trailing cable plug violation would result in an accident and injury. He stated, "I thought that someone would have to go out of their way to cause an injury under the circumstances. They would really have to go out of their way and I really don't see how that could have happened with the ground continuous checks on this system." Tr. 83. The operator argues that because one of the two shuttle car plugs was unmarked, "a simple process of elimination" would enable a person to know the identity of the cables. Br. at 3. We cannot agree with this argument or with the further contention that if someone mixed up the plugs, they [sic] [would] obviously not [have been] interested in taking elementary steps to identify what they were working with, or that they presumably would [have] ignore[d] the tag had it been there." Br. at 4. The operator's argument ignores the reality, demonstrated by the accident in 1979, that miners in a hurry may easily fail to verify which cable is which unless all cables are "plainly marked." 4/

In addition, Bohack did not effectively dispute the inspector's testimony that the keying system used at the mine to prevent the trailing cable plugs from being inserted into other than their assigned receptacle was relatively reliable. Inspector Newhouse questioned the reliability of that keying system, noting that it was not uncommon for miners at the Cumberland Mine to modify the system when a receptacle is needed. He described the possibility of such an occurrence as being "highly possible" and "probable." Tr. 77. Although USSM safety engineer Bohack testified that it is "more likely" that the key will be on the plug, he also testified that "it's possible for the key to be taken off." Tr. 87. Neither the MSHA inspector nor the company safety engineer was able to recall whether the cited trailing cable plugs were equipped with keys when the citation was issued.

In sum, we conclude that the record evidence provides substantial support for the judge's finding that the trailing cable plug violation was significant and substantial.

Citation No. 2012074

MSHA Inspector Newhouse issued this citation to USSM on August 9, 1982, upon observing an unsecured oxygen cylinder and an unsecured acetylene

shall be located no less than 10 feet from the roadway, and where the height of the coal seam permits, they shall be placed in an upright position and chained or otherwise secured against falling. [Emphasis added.]

Each of the unsecured gas cylinders weighed approximately 120 pounds. The gas cylinders had been used in repairing a continuous mining machine during the previous, non-production, midnight shift and coal production on the next shift had not yet begun when the citation was issued.

The issues before the Commission administrative law judge as to the citation were whether the violation was S&S and the penalty to be assessed. The judge upheld the S&S designation, noting that the mine section was preparing to begin a new shift and that the compressed gas cylinders could have been knocked over by a shuttle car, or other force, and could have ruptured. In the judge's view, "the valve could be broken or the cylinders ruptured, releasing the compressed gas causing the cylinders to become as missles." 5 FMSHRC at 1732.

The issue on review is whether the record supports the judge's finding holding that there was a reasonable likelihood that an accident, and injury, would occur involving the unsecured gas cylinders. Again, the Commission does not contend that any injury occurring would not be of a reasonably serious nature. ^{5/} Although our task is made more difficult by the brevity of the judge's discussion of the record and the basis for his decision, we conclude that substantial evidence supports the judge's significant and substantial finding.

The inspector testified that shuttle cars making a left-hand turn from the roadway where the gas cylinders were located into the nearby No. 1 roadway were likely to strike and to damage the unsecured cylinders. The shuttle cars were described as being approximately 8 to 10 feet in width and 18 feet in length. The inspector testified, "By making a left-hand turn, swinging in that direction, the back end of the buggy would have been in close proximity to these tanks." Tr. 165. The inspector added that the operator of an "off standard" shuttle car might not see the cylinders because he would be on the other side of the car. In the inspector's view, whether a shuttle car operator hit the cylinders "would really depend on how conscientious your operator is, how much confusion is involved," and that such an event occurring was a "probable possibility." Tr. 174.

^{5/} To the extent that USSM's brief on review can be read as challenging the judge's finding of a violation, the challenge is rejected. First, the fact of a violation was conceded before the judge. 5 FMSHRC at 172. Second, no issue as to the merits of the violation was raised in USSM's petition for review. See 28 MRS. 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 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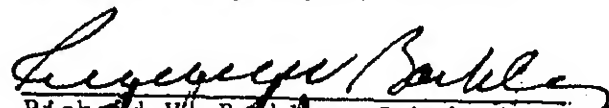
should they be struck by a shuttle car: breaking the neck (i.e., the valve) of the oxygen cylinder (the neck of the acetylene cylinder was recessed and did not pose this specific hazard); and puncturing the sides of either or both cylinders. The inspector testified that should either the valve be broken off the oxygen cylinder or the cylinders' sides be punctured, the unsecured, compressed gas cylinders would be transformed into missiles that could strike the miners working on the section or could strike the section's power center and cause a fire.

The USSM section foreman who accompanied Inspector Newhouse testified that when the shuttle cars made their left-hand turn from the roadway into the No. 3 entry, there would be an approximate clearance between the shuttle car and the gas cylinders of 3 to 5 feet. The operator also relies on the fact that shuttle cars were not running on the mine section at the time citation was issued and that the cylinders were in plastic bags awaiting shipment off the section. However, the section foreman "could not definitely say" when the cylinders were expected to be transported from the area. Tr. 186. He admitted that, "They were preparing to operate on the day shift." Tr. 169.

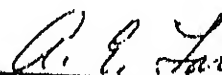
We cannot agree that the clearance of, at best, five feet between a turning shuttle car and these unsecured cylinders is enough to disturb or review the judge's conclusion that the violation was significant and substantial. Driving habits and mining conditions are too variable. In addition, given the size of the shuttle cars that use the roadway, we are not prepared to say that the record does not support the judge's conclusion that the cylinders could have ruptured. Thus, we hold that substantial evidence of record supports the judge's holding that an incident involving the unsecured, compressed gas cylinders was reasonably likely to occur.

Accordingly we affirm the judge's significant and substantial findings as they relate to citations 2012065 and 2012074. USSM additionally argues on review that the sole appropriate penalty for a violation that is not significant and substantial is \$20. See 30 C.F.R. § 100.4 ("Determination of penalty; single penalty assessment.") Although it is unnecessary to reach that issue here, we recently have rejected that same argument in U.S. Steel Mining Co., Inc., 6 FMSHRC 1148 (May 1984).


Rosemary M. Collyer, Chairman


Richard V. Backley, Commissioner

Cement Division, National Gypsum Co., 3 FMSHRC 822 (4)
concur in finding the violations in this case to be
substantial within the meaning of section 104(d)(1) of
30 U.S.C. § 814(d)(1).


A. E. Lawson, Commissioner

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assigned a higher fee rate. Jenkins testified that despite the pay difference, miners made more money working in larger stopes. Ron Short, the manager of the Republic Unit Mine and responsible for setting the incentive rates in the stopes, testified that miners made more money in the smaller stopes.

On December 11, 1980, Jenkins finished a mining cycle in stope 4114, in which he had previously completed another mining cycle. On December 1, 1980, Jenkins and his partner, Don Vilardi, were assigned to work in stope 4222. Stope 4222 was a smaller stope than stope 4114 and therefore had a higher fee rate per cubic foot of rock broken.

On December 24, 1980, a miner died in an accident at the Republic Unit Mine. Concerned by the accident, on the following day Jenkins prepared a four-page letter to Keith Droste, the general manager, and W. M. Calhoun, the president of Day Mines. The letter described several alleged safety problems at the mine, including misconduct on the part of some miners. Jenkins did not immediately mail the letter. He later added to the letter a postscript signed by four other miners who stated their agreement with Jenkins. On December 29, 1980, the first working day following the fatality, a safety meeting was called by management of the mine. At that meeting Jenkins raised several of the same complaints regarding safety that he had included in his letter. Jenkins later mailed his letter, dated December 25, 1980, to Calhoun and Droste. Pet. Exh. 1. Droste responded to each of Jenkins' complaints in a letter that was received by Jenkins on January 14, 1981. Res. Exh. 2.

On December 30, 1980, Jenkins put a notice on the mine bulletin board requesting nominations for a mine safety committee. This notice upset William Hamilton, the mine superintendent. The letter was quickly removed from the board. On January 2, 1981, Jenkins circulated a petition among fellow miners concerning a cut-off of power to the main hoist on December 24, 1980, the day of the fatal accident. The power had been turned off for three hours, creating what Jenkins considered a safety problem. Jenkins had mentioned this problem in his December 25 letter and at the safety meeting on December 29, 1980. Forty-four miners signed Jenkins' petition concerning the cut-off of power. On January 7, 1981, the petition was delivered to mine superintendent Hamilton.

On January 7, 1981, Ron Short, the mine manager, spoke with Jenkins and his partner Vilardi in the mine office. Several times Short asked whether Jenkins and Vilardi, who had also signed Jenkins' December 25 letter, had any objection to the posting of the letter on the mine bulletin board. Neither Jenkins nor Vilardi objected, and Short posted the letter. After the posting of the letter, a miner threatened Jenkins with bodily harm. Another miner, David Hamilton, the son of the mine superintendent, accused Jenkins, in the presence of others, of being an

harassment and vandalism at the mine. These acts included the placing of human waste and other substances in Jenkins' boots and other articles of his clothing, the pouring of drill oil over his lunch bucket, and the setting up of a suggestion box asking for "ways to get rid of Sam." On July 23, 1981, Short posted a memorandum on the mine bulletin board threatening employees with discipline, up to and including discharge, for involvement in acts of harassment or vandalism. Short also instructed the two shift foremen to have meetings with miners to advise them that they would be disciplined for such acts. The shift foremen testified that they had such meetings.

Following the evidentiary hearing in this case, the Commission's administrative law judge issued a decision dismissing the discrimination complaint in its entirety. The judge first examined Short's posting of Jenkins' December 25 letter, which included among its complaints references to misconduct by other miners. Jenkins argued that management's purpose in posting the letter was to identify him as a troublemaker. Jenkins asserted that the foreseeable and intended effect of the posting was to expose him to the hostility of other miners. Hecla-Day pointed out that Short had asked Jenkins several times whether he objected to the letter being posted and that Jenkins had raised no objection. Hecla-Day argued that management had a legitimate business justification for posting the letter--Short was concerned over serious allegations in the letter of alcohol use at the mine and believed he would discover whether there was any truth to them by having the letter posted. The judge found Short's explanation for posting the letter credible. The judge concluded, "[T]he evidence does not support the contention by Jenkins that posting the letter was intended to be a discriminatory act against him and such allegation is rejected." 5 FMSHRC at 499.

The judge next examined whether the failure to reassign Jenkins to stope 4114 when it became available again in January 1981 was discriminatory. Jenkins argued that it had been the usual practice in the mine to return the same mining crew to the stope they had previously worked when the sand-fill operation was completed and the stope was ready for another mining cycle. Hecla-Day contended that stope assignments were not rigid, and that Jenkins' assignment was made in accordance with the mine's existing policies. The judge found that a miner was not necessarily entitled to be returned to a stope in which he had previously worked. He also found that because Jenkins was not finished mining in stope 4222 when stope 4114 became available again and other miners were available at that time to work in stope 4114, the assignment of the other mining team to stope 4114 accorded with the operator's normal business policies. The judge concluded that neither adverse action nor discrimination had occurred in connection with the stope assignments.

With regard to Jenkins' suspension without pay in February 1981, the judge found that Jenkins had engaged in protected activity prior to his suspension and that the suspension was motivated in part by his protected

Judge denied the motion, he allowed the introduction of evidence concerning the events of July and August. The judge concluded, "I find that the evidence fails to show that [the operator] was involved directly or indirectly in any of the acts of vandalism or harassment ... inflicted on Jenkins following the filing of his complaint of discrimination." 5 FMSHRC at 504. The judge thus dismissed the discrimination complaint.

Jenkins' petition for discretionary review raises several assignments of error. His main contention is that the operator discriminated against him by posting his December 25 letter, by failing to reassign him to stope 4114 in January 1981, and by indefinitely suspending him without pay on February 4, 1981. Jenkins also asserts that the judge erred in certain evidentiary rulings and in refusing to allow amendment of his complaint to include the acts of harassment against him in July and August 1981. On review the Secretary contends only that Jenkins' suspension without pay was discriminatory. We conclude that the suspension without pay violated the Mine Act, but reject Jenkins' other assertions of error.

II.

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); and Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event for the unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1936-38 (November 1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, 3 FMSHRC at 818 n. 20. See also Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983); and Donovan v. Staff Co. Constr. Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984) (specifically approving the Commission's Pasula-Robinette test). The Supreme Court has approved the National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., ___ U.S. ___, 76 L.Ed. 2d 667 (1983).

during the period December 1980 through February 1981. These activities included his communication of safety complaints to management in his December 25 letter, his circulation of the petition in January complaint of the cut-off of power to the main hoist, his efforts to elect miners' representatives and to serve as one himself, and his voicing of safety complaints at the meetings conducted at the mine on December 29, 1980, and February 2, 1981. The crucial issue in this case is whether management took adverse actions against Jenkins because of his protected activities. We turn first to the posting of his December 25 letter and the January stope assignments.

The posting of Jenkins' December 25 letter

The judge ultimately found that Short's posting of Jenkins' letter was not a "discriminatory act." 5 FMSHRC at 499. The judge rested his dismissal of this portion of Jenkins' discrimination complaint on his crediting of Short's testimony concerning the business reasons for the posting. 5 FMSHRC at 498-99. Although the judge did not explicitly phrase his conclusion in terms of the Pasula-Robinette framework, it is apparent from his ultimate findings that he determined that Jenkins did not prove the second element of a prima facie case and therefore failed to establish a prima facie case. We agree. 1/

A showing that an adverse action occurred is a component of the second element of a prima facie case. In general, an adverse action is an act of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment

1/ Certain aspects of the judge's legal analysis of the letter-posting issue require clarification, although they do not affect his correct determination that Jenkins failed to establish a prima facie case. Cf. Secretary on behalf of Bush v. Union Carbide Corp., 5 FMSHRC 993, 996-97 n. 6 (June 1983). When viewed in the Pasula-Robinette context, the judge's ultimate finding that the posting was not a discriminatory act can only mean that he concluded there was no improper intent behind the posting. This reading of the judge's decision is reinforced by his summary of conclusions in which he stated, "Jenkins has failed to establish a case of discriminatory conduct ... in regards to [the] posting...." 5 FMSHRC at 509. Thus, in light of the judge's ultimate findings, we interpret his comment that Short's posting was, in part, "motivated" by Jenkins' protected activity (5 FMSHRC at 498) as a recognition that Jenkins' protected writing of the letter was a necessary precondition to its posting. We reject any suggestion that partially discriminatory motivation was present as being inconsistent both with the judge's ultimate findings and conclusions, and with our own determinations on review.

motivated. Here, however, the posting of Jenkins' letter was not a self-evident form of adverse action, like discharge or suspension. Therefore, we must examine closely the surrounding circumstances to determine the nature of this action.

Hecla-Day's explanation that the letter was posted in an effort to uncover the truth concerning Jenkins' allegations is credible. Jenkins sent this letter to management in the aftermath of a fatal accident. The letter leveled a number of serious safety complaints, for example, that drinking by some miners was a major problem at the mine and had been a contributing factor in the accident. 3/ As the judge found, there is every indication on this record that mine management was concerned by Jenkins' charges and was determined, in good faith, to ascertain whether they had any basis.

In a letter dated January 5, 1981, General Manager Droste acknowledged receipt of Jenkins' letter and stated:

The observations and accusations contained therein are of a most serious nature. I have informed Mr. Calhoun [the president of Day Mines], and am hereby advising you, that all items mentioned by you will be investigated and will be treated in a written response to you.

Res. Exh. 1. Management subsequently undertook an investigation of Jenkins' complaints. The investigation resulted in Droste's detailed letter of January 14, 1981, responding to and denying Jenkins' charges.

While this internal investigation was going on, Short met with Jenkins and Vilardi on January 7, 1981, to seek their permission to post the letter. Short testified that he asked for their permission several times, and that neither Jenkins nor Vilardi raised any objection to the posting. The judge specifically credited Short's testimony explaining his reasons for the

Well, in reading the letter, of course, it brought out a lot of questions to my mind. Being in my position, I am aware that not everyone is going to

2/ This case does not require us to develop a more detailed inventory of what is covered by the term adverse action. We recognize that discrimination may manifest itself in subtle or indirect forms of adverse action. See generally Moses v. Whitley Development Corp., 4 FMSHRC 1475, 1478 (August 1982). We also borrow the apt words of the Court of Claims, writing in a related context, that an adverse action "does not mean any action which an employee does not like." Fucik v. United States, 655 F.2d 1089, 1096 (Ct. Cl. 1981). Determinations as to whether an

the things that Sam had mentioned in his letter, there may be some truth to parts of it. I didn't actually believe that there was, but I felt that I had to find out if these allegations were true. I felt that by posting the letter that I would find out one or two things: either there was some truth to it and a group of miners, either who signed the letter or who also agreed with Sam and did not sign the letter, would come forth to me on posting the letter and say, "yeah, this is true," or I would get a negative response in the sense that no one would come forward and that this would also indicate to me that there was no truth to what he was saying.

Tr. 214-15. Short further testified that if Jenkins had not agreed to posting the letter, he would not have done so. Short stated that the posting did not threaten Jenkins and that their meeting was conducted without animosity.

In attacking the judge's crediting of this testimony, Jenkins argued that the foreseeable and intended consequence of the posting was to subject him to the hostility of other miners--and, presumably, to subject them to intolerable working conditions. The posting of Jenkins' letter did elicit an angry and threatening response by other miners. However, prior to posting, Jenkins had secured the signatures of four other miners to the letter, had raised some of the same complaints at the December 29, 1974 safety meeting, and had circulated a petition signed by 44 miners complaining of the power cut-off to the main hoist, a subject also mentioned in his letter. Therefore, there was demonstrated support among other miners for at least some of Jenkins' complaints. We are not persuaded on this record that when Jenkins agreed to the posting, the foreseeable and unavoidable consequence--in either his contemplation or that of the management--was the arousal of widespread antipathy towards Jenkins. Furthermore, as the judge emphasized, "These acts by Jenkins indicate an attempt on his part to publish his views as to what he considered was wrong at the Republic Unit [Mine]." 5 FMSHRC at 499.

In summary, the judge credited Short's testimony that he posted the letter with Jenkins' uncoerced consent solely for legitimate business reasons. Jenkins has not persuaded us on review to upset this credit resolution. In view of the foregoing considerations, we cannot treat the posting as an adverse action or a form of discrimination motivated in part by Jenkins' protected activity. We therefore conclude that the evidence supports the judge's dismissal of this aspect of Jenkins' claim.

The January stope assignments

The judge's findings and credibility resolutions on this issue

Regarding the stope assignment, Hecla-Day affirmatively defended against prima facie case.

The judge carefully reviewed the conflicting evidence on how stope assignments were made. He found that there was not an existing policy at the mine that expressly guaranteed permanent stope assignments to miners. He also determined that the reason Jenkins was not reassigned to stope 4114 was that he and his partner were not finished mining in stope 4222 when the assignment needed to be made, and another crew was available. The judge stated:

I find that the weight of the evidence supports [the operator's] contention that their actions in this instance were motivated by the time schedules as to the availability of miners and stopes and the requirements for continued production in the mine. Stope 4114 became available for mining on January 23, 1981 and Jenkins was not finished in 4222 until February 17, 1981 which would cause measurable loss of production if the stope was to remain idle during that time.

FMSHRC at 501.

The judge based these findings on his resolutions of conflicting evidence. He specifically credited the testimony of Short that production needs and the availability of miners were key factors to be weighed in making stope assignments. Short's testimony was corroborated by that of two experienced shift bosses. The judge also found reliable a detailed 1-page list of stope assignments over time (Res. Exh. 7), which bore out Short's testimony that miners did not have entitlements to permanent assignments in any particular stope.

Substantial evidence clearly supports the judge's determination that reassignment of miners to stopes they had previously worked was not guaranteed, and that production needs and the availability of miners were overriding factors in making the assignments. We have carefully reviewed the record and discern no reason to disturb the judge's findings. We affirm his conclusion that the failure to reassign Jenkins was based solely on legitimate business reasons in accord with existing policies. We also agree that even had management's actions been tainted in part by discriminatory animus, the same assignments would have been made in any event for these business reasons alone.

The suspension of Jenkins without pay

When Jenkins was initially suspended for an indefinite period on February 4, 1981, considerable turmoil had arisen at the mine centering on Jenkins' serious safety complaints and his attempts to represent

The evidence also shows there was animus on the part of Day Mines's management towards Jenkins because of these activities which caused tension amongst the miners, was disruptive to the operation of the mine, and reflected badly upon supervisors. From all of these circumstances, I conclude that Jenkins has established, by a preponderance of the evidence, a prima facie case under the test set forth by the Commission in Pasula-Robinette, supra.

Id. (Emphasis added.) We affirm the judge's conclusion that management suspended Jenkins without pay because of his protected activity. On the facts presented in this case, however, we disagree with his further conclusion that Hecla-Day affirmatively defended against Jenkins' prima facie case.

The essence of the Pasula-Robinette affirmative defense is a showing that the adverse action would have been taken in any event wholly apart from considerations based on the miner's protected activities. As discussed below we find no evidence that Jenkins engaged in misconduct. It also appears that less drastic alternatives were available to management for handling the situation. We cannot conclude that absent his protected activities Jenkins would have been suspended without pay.

We recognize that the asserted focus of managerial concern was on the effects of Jenkins' protected activities, not his actions themselves. A miner's exercise of protected activity may not always prove popular and may generate negative, even disruptive, reactions. However, if miners could be subjected to discipline merely because their protected activity became unpalatable to others, the exercise of protected rights could be chilled.

The judge found no misconduct on Jenkins' part. He also found that Jenkins had not "forced himself" on other miners. 5 FMSHRC at 503. The evidence supports these findings. No other miners were subjected to adverse action because of the turmoil in the mine. There was no posting of a general disciplinary notice warning against continued disruption. If, as a matter of last resort, it was deemed necessary to take action against Jenkins, and no other miners, no reason appears why he could not have been briefly suspended without penalties and with pay. 4/ However, we are left with the

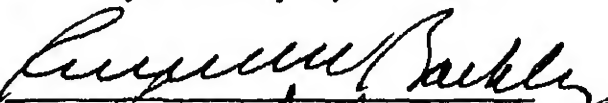
4/ The operator permitted Jenkins to return to work after a two-day hiatus following his agreement to refrain from any discussion of complaints or problems except as absolutely necessary. Although this return to work limits the operator's back pay liability to two days, we emphasize that an operator may not condition a miner's continued employment on a pledge to refrain from activities protected by the Mine Act.


Jenkins' other assertions of error lack merit and do not require extended comment. Jenkins argues that the judge erred in refusing to allow amendment of the discrimination complaint to include the acts of harassment against him in July and August 1981. The judge nevertheless allowed the introduction of evidence on this subject, and thus afforded Jenkins the opportunity to be heard on these issues. The judge found that the operator had not been involved in these acts, and had taken steps to stop them. These findings are supported by substantial evidence and affirm them. We have reviewed Jenkins' remaining evidentiary objections and conclude that the judge committed no legal error or abuse of discretion in his evidentiary rulings.

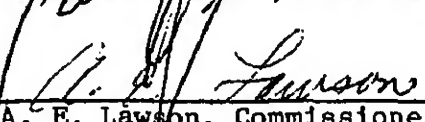
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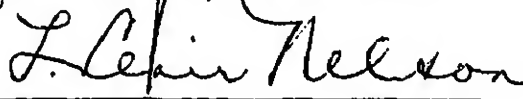
For the foregoing reasons, we affirm the judge in all respects except for his conclusion that the suspension without pay did not violate the Mine Act. On that issue, we reverse and remand so that the judge may make an appropriate and expeditious back pay award.


Rosemary M. Collyer, Chairman


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August 28, 1984

ALLIED CHEMICAL CORPORATION

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

Docket No. WEST 79-165-M

DECISION

This civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), presents issues involving longwall mining operations. A Commission administrative law judge found that the cited condition, missing bolts in longwall roof support units, constituted a violation of 30 C.F.R. § 57.9-2. 1/ We granted the petition for discretionary review filed by the operator, Allied Chemical Corporation ("Allied"). We conclude that substantial evidence supports the judge's decision and, accordingly, we affirm.

At its Alchem Trona Mine, located near Green River, Wyoming, Allied employs a longwall mining unit. Mining is conducted in longwall panel entries some 400 feet in width and considerably greater in length. The longwall mining machine consists of a cutting device known as a shearer, a face conveyor on which the shearer rides, and a line of large support units called chocks. The chocks are located behind the conveyor. Each chock is composed of an overhead canopy placed directly against the mine roof, a hydraulic ram at the base of the unit, and hydraulic legs (or jacks) between the base and canopy. The legs, approximately six inches in diameter, support the canopy and are used to raise or lower the canopy. The canopy is hinged in the middle, with a large back portion and two parallel front arms. One leg supports each of the front arms of the canopy and four legs support the back portion of the canopy.

Section 57.9-2 provides:

Mandatory. Equipment defects affecting safety shall be corrected before the equipment is used.

During the extraction process, the shearer makes continuous lateral passes across the mining face to cut the trona ore. The ore is deposited in the face conveyor below the shearer and transported by the conveyor belt away from the face. As the shearer makes cuts at the face, the chocks are moved forward by the hydraulic rams to support the newly created roof. A 400-foot face requires some 125 chocks for roof support. When all the chock units are side-by-side, parallel to the face, they form a continuous chock line. As mining progresses and the chock line is snaked forward, the roof is allowed to collapse behind the chocks.

The bolts that are the subject of this proceeding are made of soft steel and are three-quarters of an inch in diameter and approximately eight inches long. One bolt is inserted through each chock leg. The attachment point is near the top of the leg just below a two to three-inch cup in the canopy in which the leg is positioned. The bolt is not intended to provide direct roof support. Because of the stresses generated in the operation of the chock equipment, the bolt will shear off at some point during its use. However, the bolt serves two important functions: preventing the legs from twisting beyond their design limits, especially when the ram moves the chock forward, and holding the legs in proper position in the canopy cups when the legs are raised or lowered. Hydraulic lines are attached to each leg near the point where the bolt is placed. As discussed below, if the leg twists due to a missing bolt, the hydraulic lines could be torn off or ruptured. Such twisting could also damage or destroy the hydraulic packing inside the leg.

The events leading to the citation at issue began on January 26, 1979, when inspectors from the Department of Labor's Mine Safety and Health Administration ("MSHA") conducted a methane spot inspection of the Allied mine pursuant to section 103(i) of the Mine Act. 30 U.S.C. § 813(i). The inspectors determined that the panel in which the longwall miner was located contained amounts of methane in excess of applicable standards and issued an order withdrawing miners from the longwall mining area. On January 29, 1979, MSHA inspectors conducted an abatement inspection of the longwall area. During the course of this inspection, the inspectors walked down the chock line and noticed two bolts missing from legs on chocks No. 105 and 106. One of the inspectors issued a citation alleging a violation of section 57.9-2. The citation stated that the absence of the bolts "would create a hazard to persons working under these chocks." On the accompanying "Inspector's Statement," the inspector asserted that the missing bolts would adversely affect the chocks' roof-supporting capabilities. During the same inspection, the inspectors also issued three other citations alleging electrical violations in connection with a flag switch box located on a conveyor frame.

The record reflects no disagreement that the condition of the chocks and their leg bolts observed in the mine by the inspectors on January 29 had not changed since January 26.

the standards in section 57.9 are grouped under the heading "Loading, hauling, dumping"--subjects that do not pertain to roof support. The judge rejected this argument, relying on canons of construction, the general purpose and structure of the Part 57 regulations, and the plain language of the standard itself. 4 FMSHRC at 507-08. Applying the elements of the standard to the evidence, the judge found that the missing bolts were "equipment defects affecting safety," and that, within the meaning of the standard, the defects had not been corrected before the equipment was used. 4 FMSHRC at 505-06, 508. Finally, the judge rejected Allied's defense that the chocks were being repaired at the time the withdrawal order was issued on January 26. 4 FMSHRC at 506. 2/

In urging reversal, Allied repeats the arguments it raised below: that the cited standard does not apply to its longwall roof support equipment, that the various elements of the standard necessary to a finding of violation are not satisfied by the evidence, and that the bolts were in the process of being replaced when the withdrawal order was issued on January 26. These arguments are rejected.

We turn first to the coverage of the standard. Allied asserts that the heading of 30 C.F.R. § 57.9--"Loading, hauling, dumping" -- bars application of section 57.9-2 in the longwall roof support context. However, it is evident from the structure and the content of Part 57, Safety and Health Standards--Metal and Nonmetal Underground Mines, that the headings used in that Part are designed for organizational convenience to supply short-hand characterizations of the general subject matter involved in the standards. The only stated limitations on the scope of the standards contained in Part 57 are distinctions between those standards applicable to underground operations, those applicable to surface operations of underground mines, and those applicable to both areas of operation. The plain words of section 57.9-2 broadly refer to the correction of "equipment defects" without any limitations as to the types of equipment covered. While headings may sometimes provide an intrinsic aid to construction, they do not control over the plain words of a legislative text. In cases of conflict, precedence must be

2/ The judge vacated the three electrical citations based on his finding that an Allied electrician was repairing the cited switch box when the withdrawal order was issued. The Secretary of Labor has not sought review of this aspect of the judge's decision.

See, for example, Brotherhood of Railroad Trainmen v. Baltimore & Ohio RR, 331 U.S. 519, 528-29 (1947); U.S. v. Roemer, 514 F.2d 1377, 1380 (2d Cir. 1975); 2A C.D. Sands, Sutherland Statutory Construction § 47.14 (pp. 93-97) (4th ed. 1973).

Moreover, we are not persuaded that any conflict exists between the heading of section 57.9 and the body of section 57.9-2 as applied to the distinctive longwall operations involved in this case. The cited longwall unit is a single integrated equipment system. The chocks are an integral and essential component of the longwall unit, which is primarily used to cut ore and to load and transport it away from the face. These latter functions are within the scope of the heading of section 57.9, and they cannot be performed without the roof support integrally provided by the chocks. For the foregoing reasons, we conclude that section 57.9-2 was properly applied to the chock components of the Allied longwall unit.

The major issues regarding the judge's findings that Allied violated section 57.9-2 mirror the elements of the standard: (1) whether the missing bolts constituted an "equipment defect"; (2) if so, whether this defect was one "affecting safety"; and (3) whether the operator failed to correct the defect before the equipment was used.

Allied does not directly press an "equipment defect" argument on review, although some of its contentions imply that no defect was present. In both ordinary and mining industry usage, a "defect" is a fault, a deficiency, or a condition impairing the usefulness of an object or a part. Webster's Third New International Dictionary (Unabridged) 591 (1971); U.S. Department of Interior, Bureau of Mines, A Dictionary of Mining, Mineral, and Related Terms 307 (1968). Substantial evidence supports the judge's finding that the utility of a chock is impaired by the absence of a leg bolt. The chock's function as a means of roof support depends in part upon the successful operation of the legs that support and raise and lower the canopy. Each leg includes a bolt at the top to hold and guide the leg in the canopy cup. The record is replete with evidence that without the bolt the leg may twist excessively, resulting in damage to the hydraulic hoses attached to the leg or to the hydraulic packing inside the leg. A missing bolt may also be a causal factor in a leg coming completely out of a canopy cup. In either case, the chock would not perform its roof support function as effectively and, ultimately, the bolt would have to be replaced. Thus, the absence of a bolt is an "equipment defect" within the meaning of section 57.9-2. 3/

3/ In reaching this result, we do not approve the judge's statement that an equipment defect automatically arises "when equipment is not maintained in the manner in which it is received from the manufacturer."

limited. Although this case does not require us to describe the minimal effect on safety cognizable under the standard, it is clear that the standard has a wide reach. The safety effect of an uncorrected equipment defect need not be major or immediate to come within that reach.

Substantial evidence supports the judge's finding that the missing bolts affected safety. 4/ There is no dispute on this record that without the bolts legs could twist excessively, severing the attached hydraulic hoses or damaging the internal hydraulic packing. The inspectors involved in issuance of the citation credibly testified that any such failure in the integrity of the hydraulic support system could cause a loss of hydraulic pressure in the affected legs and a consequent and unintended drop of the canopy or one of its hinged portions. The area along the chock line under the front canopy arms was a travelway used by miners. A drop of any portion of the extremely heavy canopy could pose a hazard to miners in the area. An unintended lowering of the canopy would also lessen the continuity of the available roof support and could increase the risk of roof falls.

Allied argues that in the event of damage to hydraulic lines or packing, hydraulic pressure in the affected legs normally would be maintained by safety stop valves in the equipment. We are not persuaded. As the judge found (4 FMSHRC at 505), if the stop valves were activated the affected chocks would have to be "bled off" and the canopies lowered. In turn, the lowering of the canopies could adversely affect the safety of the roof support.

As noted below (n.4), it is not clear which legs on chocks No. 105 and 106 were lacking bolts. Allied argues that, as to the rear portion of each canopy, all four legs and the stop valve system would have to fail before any lowering in the rear of the canopy occurred. While we agree that the immediacy of the effect is greater if one of the single

4/ We note that the record does not clearly indicate which legs on chocks No. 105 and 106 were lacking bolts. Because there was testimony that the front arms of the chocks in question were tipped down at the time of the citation (Tr. 119), it appears that one of the front legs of each chock was involved. However, as discussed in the text, our decision would be the same regardless of which legs were involved.

failure occurring in the affected chock unit is increased. Allied correctly points out that because of the stresses under which the equipment operates these soft steel bolts are designed, and are expected to shear off. However, this design feature does not relieve Allied of the duty continually to maintain the chocks with a full complement of inserted bolts. Furthermore, a missing bolt may also cause the longwall chock to fail to reset in the canopy cup during movement of the canopy. Should this happen, the canopy would be compromised and roof support could be adversely affected. In this case, the judge credited the testimony of the MSHA inspector that the citation was issued, in part, because one of the legs was out of the canopy cup at the time the FMSHRC at 505.

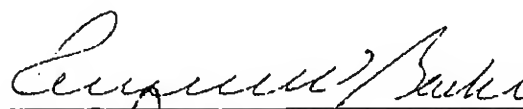
The judge also rejected Allied's argument that a violation did not occur because there was no evidence that the bolts were missing before the chock line was put in use, the chock line was pre-shift inspected, and the bolts were supposed to be replaced every eight hours. In evaluating Allied's contentions, the unique features of the longwall roof support system must be taken into account. As Allied recognizes, the chocks are in use continuously from the time they are raised to support the roof. Petition for Discretionary Review 17. Even if a longwall miner is de-energized and the shearer is not operating, hydraulic chocks still support the roof. The record indicates that the chocks were supporting the roof on January 26 when the withdrawal citation was issued.

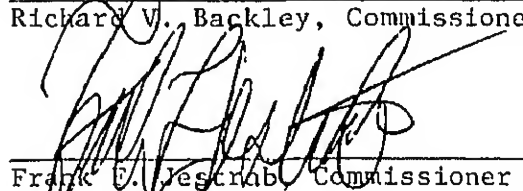
In Ideal Basic Industries, Cement Division, 3 FMSHRC 843 (April 1981), we held that use of a piece of equipment containing a defective component capable of being operated and which, if operated, could affect safety constituted a violation of 30 C.F.R. § 56.9-2, the identical safety standard for sand and gravel mining operations. 3 FMSHRC at 844-845. In Solar Fuel Company, 3 FMSHRC 1384 (June 1981), we held that electrical equipment in impermissible condition and habitually used or intended for use inby the last open crosscut could be cited for violation of 30 C.F.R. § 75.503, even if the equipment was located outby the last open crosscut at the time of citation. 3 FMSHRC at 1385-86. In both cases, we interpreted the standards in light of their broad purposes. The result was to assure greater safety in equipment use.

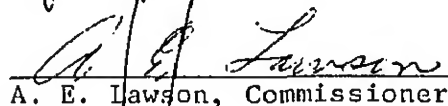
A similar application of the standard cited in this case is found in Defects affecting safety in equipment continuously in operation, those occurring during the course of operation, must be corrected before the equipment is used any further. The contrary approach urged by Allied could result in such defects not being repaired for substantial periods of time, thus needlessly increasing safety risks.

...were being repaired. Allied produces no evidence that miners were actually repairing the condition. The Allied longwall supervisor testified that "he could not remember" the name of the panel mechanic he claimed to have assigned January 26 to inspect the chocks. Tr. 193. The judge credited the inspector's testimony that no tools were present and no one claimed maintenance was being done in the area of chocks No. 105 and 106 on January 26. On review, Allied has not persuaded us that the judge erred in his credibility resolution or in his ultimate finding on this issue. Moreover, we concur with the judge's observation that assigning a miner to do work is not equivalent to having completed the work.

Thus, we conclude that the missing bolts constituted an "equipment defect affecting safety" that was not corrected before use of the equipment. On the foregoing bases, we affirm the judge's decision. 5/


Richard V. Backley, Commissioner


Frank E. Jestrab, Commissioner


A. E. Lawson, Commissioner

5/ Commissioner Nelson did not participate in the consideration or disposition of this case.

completely separate circumstance. While there may have been a citable violation on the facts of this case, a question which the record here is insufficient to answer, any violation was not of the standard cited by the Secretary and relied upon by the majority.

As acknowledged by the majority, the chocks of Allied's longwall mining system "function as a means of roof support." Dec. at 4. The fact that each of two separate chocks was missing one bolt from one unidentified leg allegedly created a roof control hazard. But the citation issued by the inspector and upheld by the majority alleges a violation of a standard relating to loading, hauling and dumping, not to roof support. I cannot understand how this condition fits within the scope of the selected standard and would hold that the Secretary failed to prove a violation.

The inspector cited a violation of 30 C.F.R. 57.9-2. Subpart 9 of Part 57 applies on its face to "Loading, hauling, dumping." While I agree with the general concept behind the majority's opinion that too much can be made of a statutory or regulatory heading, that principle is stretched too far here. If applied as the majority chooses, the cited standard becomes redundant with other standards in Part 57 and could well introduce a general-duty concept to Mine Act enforcement. Such a result is inimical to the intent of the Act, the regulatory scheme of Part 57, and the legislative history.

It must first be noted that the Mine Act is a statute that provides for liability without fault, commonly called strict liability. Allied Products Co. v. FMSHRC, 666 F.2d 890, 893-894 (5th Cir. 1982). Ignorance of a violative condition does not relieve an operator of liability although it may reduce an assessed penalty. Therefore, the entire scheme of 30 C.F.R. in general, and of Part 57 in particular, must be read in a manner that provides clear notice of which standards are applicable to various mining situations.

The overall organization of the regulations attempts to do just this. Different Parts of 30 C.F.R. contain safety and health standards applying to metal and nonmetal open pit mines (Part 55); to sand, gravel and crushed stone operations (Part 56); to metal and nonmetal underground mines (Part 57); and to coal mines (Parts 70-90). Within each Part, different Subparts apply to different activities at those mines: Part 57 applies to metal and nonmetal underground mines and is divided into various Subparts for standards generally applicable to ground control, explosives, drilling, electricity, and illumination.

Within each Subpart, the individual standards are further divided into sections containing those standards applicable to both surface and underground areas of underground mines, those applicable only to surface areas and those applicable only to underground areas.

Nor was this organization accidental. Part 57 was promulgated by the Secretary of the Interior on July 31, 1969. 34 Fed. Reg. 12517. The preamble to that promulgation notes that one of the changes made in the final standards from the earlier proposal was the combination of certain related subparts. It also explains that Parts 55, 56 and 57 will have parallel organization, stating (emphasis supplied):

Sections which deal with a given subject will have identical decimal numbers in the three sets of regulations which deal with open pit mines, sand, gravel, and crushed stone operations, and underground mines. Thus, the standards on drilling in the three sets of regulations will appear in Sections 55.7, 56.7 and 57.7, respectively; and standards on materials handling and storage will appear in Sections 55.16, 56.16, and 57.16.

By the same token, it seems to me obvious that the ground control standards found in subparts 55.3, 56.3, and 57.3 are those to which a metal-nonmetal or sand and gravel operator should be able to look to determine whether its roof and ground control system complies with relevant federal requirements.

In fact, 30 C.F.R. 57.3-22 states (emphasis supplied):

Miners shall examine and test the base, face, and rib of their working places at the beginning of each shift and frequently thereafter. Supervisors shall examine the ground conditions during daily visits to insure that proper testing and ground control practices are being followed. Loose ground shall be taken down or adequately supported before any other work is done. Ground conditions along haulageways and travelways shall be examined periodically and scaled or supported as necessary.

If it is MSHA's position that the missing bolts rendered the chocks inadequate to support the roof at Allied's trona mine, it could have issued a citation under this standard saying so. It makes no sense to try to bootstrap an alleged roof control deficiency into the cited loading, hauling, and dumping standard.

Furthermore, if Section 57.9-2 is given the broad interpretation that the majority uses, it would be redundant with a number of analogous standards in other subparts of Part 57. For example, 30 C.F.R. 57.7-2, under the heading "Drilling," is identical to the standard cited in this case: "Equipment defects affecting safety shall be corrected before the equipment is used." If either standard were intended to be applicable to all equipment in underground metal and nonmetal mines, there would be no need for two identical standards. A number of additional standards in Part 57, although not containing wording identical to that in Section 57.9-2, provide similar prohibitions against the use of defective equipment. See, e.g., 30 C.F.R. 57.3-8, 57.10-3, 57.12-30, 57.14-26, 57.19-120. Under the majority's interpretation of Section 57.9-2, the need for these standards would be obviated.

For similar reasons, I also cannot agree with the majority's conclusion that the roof support chocks may be considered loading, hauling and dumping equipment within the scope of section 57.9. The basis for this holding is that "[t]he chocks are an integral and essential component of the longwall unit, which is primarily used to cut ore and to load and transport it away from the face." Dec. at 4. However, the primary purpose of any mining system is "to cut ore and load and transport it away from the face." In underground mines, roof support is essential to this process and roof control is therefore an integral part of any underground mining cycle. The fact that there is some physical, rather than only functional, connection between the various components of a longwall system cannot be used to transform a roof support chock into a piece of haulage equipment.

Of equal importance, the broad application of 57.9-2 adopted by the majority also converts that standard into a general duty standard, contrary to the express intent of Congress in enacting the Mine Act. House and Senate Conferees explicitly removed a general duty clause contained in the Senate version of the Mine Act before passage. The Conference Report explained:

The Senate bill contained a "general duty" clause which required operators to furnish safe and healthful working conditions free from recognized hazards likely to cause death or harm to miners and to comply with rules, regulations and orders promulgated under the Act. This provision would have permitted the issuance of citations or the assessment of civil penalties based on violations of the general duty. The House amendment had no general duty clause.

The conference substitute

Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 1316-1317 (1978). The report further explained Congress' belief that the imminent danger provision of Section 107(a), 30 U.S.C. 817(a), was sufficient to protect miners' health and safety where dangers outside the scope of the specific standards existed. Id. The scheme adopted by Congress provides this protection to miners without a general duty clause that would subject operators to mandatory civil penalties for conditions which are not prohibited by specific standards.

By its decision, however, the majority introduces into the cited standard a "general duty" concept applicable well beyond loading, hauling and dumping. The decision ignores the nature of underground mining systems and turns identical or similar standards within other Subparts into surplusage. It ignores the clear legislative history declining to adopt a general duty concept. It also ignores the relevant roof control standard which is applicable.

I dissent.



ROSEMARY M. COLLYER, Chairman

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August 28, 1984

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : DOCKET NO. PENN 83-63
 :
U. S. STEEL MINING CO., INC. :

DECISION

The issue in this civil penalty case is whether a cited violation of a regulation relating to permissible electric equipment was properly designated "significant and substantial," as that term is used in the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act").

The case involves a violation of mandatory safety standard 30 C.F.R. § 75.503, which requires coal mine operators to "maintain in permissible condition all electric face equipment required . . . to be permissible . . ." 1/ Here, one of four bolts required to attach the lens to the headlight assembly of a shuttle car was loose, compromising the explosion-proof nature of the headlight compartment. In a civil penalty proceeding before an administrative law judge of this independent Commission, U. S. Steel Mining Co. ("U.S. Steel Mining") conceded that it had violated the standard, but argued that the violation should not have been designated significant and substantial under the Commission's decision in Cement Division, National Gypsum Co., 3 FMSHRC 822 (April 1981).

At the hearing before the judge, the MSHA inspector who issued the citation was the only witness to testify about the violation in this case. He explained that he had issued the citation at 10:30 a.m. on January 4, 1982. Shortly before, at 9:20 a.m., the inspector had also issued a citation for excessive coal accumulations in an entry and crosscut about 320 feet

1/ Relevant permissibility standards are set forth in 30 C.F.R. Part 18, including § 18.46(a), requiring that headlights "be constructed as explosion-proof enclosures." "Explosion-proof

had stopped mining activities in order to clean up the cited accumulation. 2/ The cleanup was still in progress when the inspector issued the shuttle car citation.

The MSHA inspector testified that the purpose of requiring that headlights "be constructed as explosion-proof enclosure 30 C.F.R. 18.46(a), is to ensure that any ignition that may occur inside the headlight will not escape into the mine atmosphere. He explained that the atmosphere inside the enclosure expands and contracts as the headlight is turned on and off. When the headlight is turned off, the atmosphere inside the enclosure cools, contracting and drawing in outside air which may contain methane. Sparks in the headlight compartment could cause a methane ignition inside the compartment. The inspector testified that, if such an ignition occurred, "[w]ith the one bolt loose like that, the pressures that are built up, you could have distortion or even breakage of some of the other bolts which would allow the flame from an ignition inside the compartment to escape to the outside atmosphere." Tr. 81. In that event, a larger explosion could then occur, injuring or killing the shuttle car operator or any other nearby miners.

The inspector testified that he designated the violation as significant and substantial because he believed that an explosion of this type was "a reasonable thing that could happen." He noted that an explosion "in either Colorado or Utah" that recently killed 15 people "was directly attributed to an explosion" in a headlight compartment. Tr. 82. He also testified that Maple Creek #2 is a gassy mine that liberates over one million cubic feet of methane in a 24-hour period and noted that the shuttle car was on the same section where he had just cited U. S. Steel Mining for excessive coal accumulations.

Based on this testimony the judge affirmed both the citation and the inspector's significant and substantial finding. 5 FMSHRC 1873 (October 1983) (ALJ). He assessed a civil penalty of \$100 for the violation, 3/ and U. S. Steel Mining petitioned for discretionary review.

2/ A U. S. Steel Mining witness testified, in reference to the accumulation violation, that no mining had yet started on that shift, because the company was aware that the cleanup had to be completed before mining could be resumed. The judge did not make a specific finding on this issue.

the standard, argues that the likelihood of the violation contributing to a methane explosion was so remote that the violation may not be designated significant and substantial. Specifically, it argues that the judge's "premise" that sparking occurs within a headlight is "unsupported in fact or by the record." (Br. 3) It further claims that an explosive concentration of methane would not have occurred in the area of the violation and that neither the inspector nor the judge properly applied the Commission's National Gypsum test in determining that the violation should be designated significant and substantial.

We hold first that substantial evidence supports the judge's conclusion that sparking occurs within the headlight. We note again that the inspector who issued the citation was the only witness to testify about the violation. He testified that, although sparking within the headlight is not "normal," it is "frequent" and can be caused by any of a number of factors. Tr. 85, 89. Since U. S. Steel Mining presented no contrary evidence, we reject its assertion that the judge erred in finding that sparking occurs within the headlight.

As to the contention that any hazard posed by the violation was too remote to justify a significant and substantial designation, we have previously held that a violation should be designated significant and substantial "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." National Gypsum, *supra*, 3 FMSHRC at 825. In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984) we explained:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

We have further explained that the third element of the Mathies formulation "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U. S. Steel Mining Co., 6 FMSHRC (Docket No. PENN 83-39, slip op. at 3)(August 1984). In our decisions we have emphasized that, in line with the language

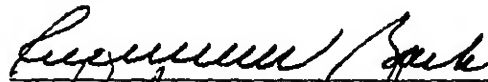
Applying these principles to the instant case, we affirm the judge's holding that the cited violation was properly designated significant and substantial. In doing so we reject U. S. Steel Mining's contention that because mining was not taking place at the precise moment the citation was issued, the violation posed no hazard. Mining was scheduled to resume as soon as the near accumulation was cleaned up, and there was no suggestion that U. S. Steel Mining, in the normal course of events, would have discovered and corrected the violation before that time.

Similarly, the fact that the mine's ventilation was adequate at the time the citation was issued did not diminish the possibility that the violation would result in a serious mine hazard. The Maple Creek #2 mine is classified as gassy and has a history of methane ignitions. Additionally, there was an excessive accumulation of coal not far from the cited shuttle car. U. S. Steel Mining offered no evidence to rebut the testimony of the inspector that it was reasonably likely that the violation would contribute to a methane explosion. Under the circumstances we believe that the violation was properly designated significant and substantial.

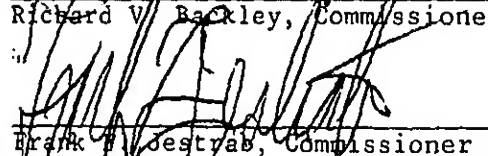
For the foregoing reasons we affirm the decision of the administrative law judge.



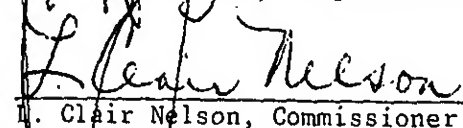
Rosemary M. Collyer, Chairman



Richard V. Backley, Commissioner



Frank J. DeStras, Commissioner



W. Clair Nelson, Commissioner

Commissioner Lawson concurring:

On the basis of the criteria set forth in my separate opinion in Cement Division, National Gypsum Co., 3 FMSHRC 822 (April 1978)

~~CONFIDENTIAL~~
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Federal Mine Safety & Health Review Commission
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Falls Church, Virginia 22041

August 29, 1984

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket No. WEST 81-186-M
:
v. :
:
CATHEDRAL BLUFFS SHALE OIL COMPANY :

DECISION

This civil penalty case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982). At issue is whether a Commission administrative law judge erred in dismissing a citation issued to Cathedral Bluffs Shale Oil Company for a violation arising from the work activities of an independent contractor. 4 FMSHRC 902 (May 1982) (ALJ). We affirm the judge's dismissal of the citation, but for the reasons detailed below.

Cathedral Bluffs is a Colorado partnership between Occidental Oil Shale, Inc. and Tenneco Shale Oil Company. Occidental is the partnership's operating partner and, for purposes of this case, is referred to as the "production-operator" of the Cathedral Bluffs mine. On February 8, 1978, Occidental contracted with Gilbert Corporation for the development of three underground vertical shafts at the Cathedral Bluffs site at Rio Blanco, Colorado. On September 4, 1980, a Department of Labor Mine Safety and Health Administration (MSHA) inspector conducted an inspection of the ventilation and escapeway shaft, the "V&E" shaft, then under development by Gilbert. At the time of the inspection this vertical shaft descended about 1125 feet. Landings, or stations, were cut horizontally into the shaft walls at predetermined levels. The MSHA inspector observed that, contrary to the requirements of 30 C.F.R. § 57.19-100, the 1050 landing was not equipped with substantial safety gates constructed so that material would not go through or under them. 1 Instead, a chain was hung across the landing which could not prevent objects from falling down the shaft. The inspector issued citations alleging a violation of section 57.19-100 to both Gilbert and Occidental

1/ 30 C.F.R. § 57.19-100 provides:

Mandatory. Shaft landings shall be equipped with substantial safety gates so constructed that materials will not go through or under them; gates shall be

it by the inspector, and accordingly, that citation became a final order by operation of law. 30 U.S.C. § 815(a). Occidental, however, did contest the citation issued to it and the penalty proposed by the Secretary of Labor. It is the propriety of the issuance of the citation to Occidental, under these circumstances, that is before us.

The Commission's administrative law judge held that our decision in Phillips Uranium Corporation, 4 FMSHRC 549 (April 1982), was "dispositive and "on the authority of Phillips" he vacated the citation. The judge re Phillips as establishing a per se rule that:

liability for a violation may not be imposed against an owner-operator where the owner has retained an independent company with experience and expertise in the activity being undertaken and where the owner's exposed employees do not perform any other work other than to observe the progress of the contractor's activities to assure compliance with quality control and contract specifications.

4 FMSHRC at 902. Finding that the facts of the present case fell within this perceived rule, the citation was vacated.

On review the Secretary argues that the judge erred in applying Phillips as controlling precedent. The Secretary asserts that the citations at issue in Phillips were issued under MSHA's former "interim" policy of citing only owner-operators for independent contractor violations. Since then, however, new independent contractor identification regulations have been adopted and were in effect at the time the citation was issued to Occidental. 44 Fed. Reg. 44494 (July 1, 1980) (adopting new 30 C.F.R. Part 101. Morever, the Secretary argues that in issuing the citation, the inspector relied upon and correctly applied the enforcement guidelines formally published by the Secretary in the Federal Register as an appendix to the independent contractor identification regulations. 44 Fed. Reg. 44497. Accordingly, the Secretary submits that Phillips is not controlling and that the citation issued to Occidental for the violation committed by its independent contractor must be upheld as a proper exercise of his enforcement authority.

We agree with the Secretary that the judge read Phillips too broadly and misapplied it as directly controlling the disposition of this case. Contrary to the Secretary's assertions, however, we find that under a proper application of governing legal principles, and in light of relevant facts and findings by the judge and the record considered as a whole, the judge's dismissal of the citation must be affirmed.

The present case stands in a procedural posture different in a crucial respect than that presented to us in Phillips. In Phillips the Secretary had instituted proceedings solely against the production

violations committed by them. Accordingly, we held that the Secretary's decision to proceed against Phillips, and not against the contractor, had totally negated the intended effect of the Act's provisions requiring the imposition of cumulative sanctions against independent contractors, and that the Secretary had so acted simply because it was administratively convenient for him to seek penalties from the production-operator. For these reasons, the citations were vacated.

In contrast to the procedural posture of Phillips, the violation issue in this case occurred subsequent to the Secretary's adoption of new independent contractor regulations and enforcement guidelines. Through these vehicles the Secretary abandoned his interim "owners-only" policy and established a new, formal policy governing the issuance of citations to independent contractors. Purportedly in accordance with this policy, in the present case the Secretary cited Occidental as well as its contractor for the contractor's failure to guard the shaft landing. Therefore, the rationale we relied on to vacate the citation at issue in Phillips is not relevant here. Rather, the appropriate inquiry is whether the Secretary's action reflects proper application of the Secretary's new independent contractor enforcement policy. As explained below, we hold that it does not.

The Secretary's formally adopted policy regarding the issuance of citations for violations of the Act committed by independent contractors provides:

Enforcement action against production-operators for violations involving independent contractors is ordinarily appropriate in those situations where the production-operator has contributed to the existence of a violation, or the production-operator's miners are exposed to the hazard, or the production-operator has control over the existence of the hazard. Accordingly, as a general rule, a production-operator may be properly cited for a violation involving an independent contractor (1) when the production-operator has contributed by either an act or omission to the occurrence of a violation in the course of an independent contractor's work, or (2) when the production operator has contributed by either an act or omission to the continued existence of a violation committed by an independent contractor, or (3) when the production operator's miners are exposed to the hazard, or (4) when the production-operator has control over the condition and needs abatement.

we conclude that the Secretary has failed to establish in the record the requisite support to conclude that these criteria were met in the present case.

According to the Secretary's third criterion, a production-operator appropriately may be cited for a violation committed by an independent contractor when the production-operator's employees are exposed to the hazard created by the violation. Viewed as a whole, the record before us is devoid of substantial probative evidence of such exposure. The MSHA inspector testified that at the time that he observed the lack of a safety gate at the 1050 landing, the lowest landing then developed, no miners were below the landing. He further testified that he had never seen Occidental employees at the bottom of the shaft. 3/ No other evidence by the Secretary specifically places any Occidental employee at the bottom of the shaft at any point during the indeterminate period that the 1050 landing lacked safety gates. There is general testimony in the record to the effect that "quality control" inspectors and "safety inspectors" employed by Occidental observed Gilbert's work as it progressed. There is no convincing, specific testimony, however, concerning the frequency and duration of such visits, or whether any such Occidental employee in fact was exposed to the hazard posed by the improperly guarded 1050 landing. Although there is testimony that an employee of Occidental took gas samples in the shaft, including the bottom area, at unspecified intervals, the extent of this employee's presence in the shaft cannot be determined and no evidence establishes that he was at the shaft bottom at a time when the 1050 landing lacked guards. Thus, a finding of exposure of any Occidental employee to the cited hazard can only be based on a large amount of inference and conjecture, rather than on probative record

Fn. 2/ continued

corresponding enforcement guidelines. Sec. Brief at 15-18. He emphasizes that "the Secretary decided to develop his prosecutorial policy through the public procedure of rulemaking" (Brief at 16 n. 12), and that "these formally published guidelines give clear public notice of the Secretary's policy in exercising his discretionary policy." Brief at 17. We agree with the Secretary that his independent contractor enforcement guidelines are distinguishable from the provisions of his internal Inspector's Manual which were found to be without legal effect in King Knob Coal Co., 3 FMSHR 417 (June 1981).

3/ The inspector did state that during his inspection of the shaft certain Occidental employees accompanied him to the shaft bottom. The presence of these employees at the shaft bottom cannot be relied on to support a finding of exposure. Section 103(f) of the Act provides miners and operators with the right to designate representatives to accompany inspectors "for the purpose of aiding such inspection." 30 U.S.C. § 813(f). Any suggestion that exercise of this "walkaround" right, which is intended

evidence. Although circumstantial evidence can be relied on in appropriate circumstances to establish a violation under the Mine Act, the degree of inference and speculation necessary to be indulged in here to support a finding of exposure, would require us to ignore the Secretary's obligation to prove the existence of a violation. This we will not do.

Assuming arguendo that the record could be viewed as supporting a reasonable conclusion that Occidental's quality control and safety inspectors were, to some extent, exposed to the violative condition, we would nonetheless conclude that such incidental exposure could not support the citation issued to Occidental. If sufficient exposure were to be found on these facts, the Secretary's much-heralded independent contractor citation policy effectively would be reduced to a "paper tiger" lacking any substantive or practical effect. Independent contractors are engaged by mine operators because of their expertise in specialized tasks. The relationship between production-operators and independent contractors is, by definition, governed by contract. ^{4/} That relationship also is defined to provide a contractor freedom from the production-operator's control in the actual performance of the task it is hired to accomplish. Equally endemic to such a contractual relationship is the right of the production-operator to determine if the services or goods contracted for have, in fact, been satisfactorily provided. This necessitates, to varying degrees, a monitoring and inspection of the progress of the work being performed and an inspection and acceptance of the work once completed.

The present case presents a typical contractual relationship. See Exh. R-1. Occidental contracted with Gilbert Corporation for the development of three vertical underground shafts. As we observed in Phillips, supra, "the hiring of contractors to perform the specialized task of shaft construction is common in the mining industry." 4 FMSHRC at 553. Because Gilbert was retained for its expertise in shaft sinking, it necessarily was given control over the performance of this specialized work. In fact, no Occidental employee was permitted to enter the shaft unless accompanied by a Gilbert employee. In accordance with contractual and industrial reality, however, Occidental necessarily retained the right to monitor the work being performed to determine if the contract were being discharged properly. The frequency and duration of the visits by Occidental personnel to the shaft is impossible to determine from the record. It is clear, however, that Occidental's presence in the shaft was no more than reasonably can be expected in any such contractual relationship and did not involve the production-operator in the particulars of the work being performed. It is certainly clear that, contrary to the statement in the

^{4/} As generally used at law, the term "independent contractor" describes a party that "contracts with another to do something ... but who is not controlled by the other nor subject to the other's right to control with

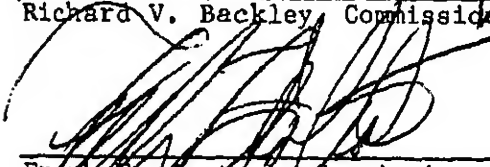
brief at 20. We cannot conclude that the limited access of Occidental's employees to the work activities of its contractor, as demonstrated by this record, satisfies the exposure criterion in the Secretary's enforcement guidelines without rendering the guidelines meaningless.


We also must reject the Secretary's assertion that the present facts satisfy the fourth criterion in his enforcement guidelines for citing production-operators for contractor violations, i.e., "control over the condition that needs abatement." As discussed above, it is true that Occidental reserved certain rights in its contract with Gilbert, including the right to monitor and inspect work provided and the right to terminate the contract in whole or in part if Gilbert "persistently disregard[ed]" applicable laws, including the Mine Act. (Exh. R-1, paragraphs 7 and 20.) The Secretary points to these contractual provisions as proof that in this case Occidental had "control over the condition that needs abatement" within the purview of his fourth criterion. We find this assertion unpersuasive. The rights reserved by Occidental are basic contractual rights universally reserved in well-drafted contracts in this industry and others. To hold that the mere presence of such language in contracts between production-operators and independent contractors satisfies the criterion of "control" under the Secretary's independent contractor enforcement guidelines, would vitiate the very essence of the guidelines. The plain fact is that if the contractual provisions in this case constitute "control" for citation purposes, every production-operator could be cited for every contractor violation. This result has long been criticized as ineffective enforcement of mine safety statutes and was ostensibly abandoned by the Secretary upon the adoption of his new policy. See, e.g., Association of Bituminous Contractors v. Andrus, 581 F.2d 853, 863 (D.C. Cir. 1978); Phillips Uranium, supra; and Old Ben, supra, (majority and dissenting opinions).

We hold that before a production-operator can be deemed to "control" a contractor's activities sufficient to justify the issuance of a citation to it for a contractor's violation, some functional nexus, beyond the contractual nexus reflected here, must be demonstrated linking the production-operator's involvement with the contractor's violation. We emphasize that in this case an independent contractor with a continuing presence at the mine site was cited for a violation it committed in the course of its specialized work; the contractor did not contest the citation; and the hazardous condition was abated promptly. Given these facts and the lack of any demonstrated exposure of Occidental employees or control by the production-operator other than routine verification of work performed, we believe that harm, rather than good, would be done to the goal of achieving maximum mine safety and health if such a strained interpretation and application of the Secretary's enforcement policy were upheld. Therefore, we decline to interpret the Secretary's regulations and guidelines to require precisely what their adoption was intended to avoid.


Rosemary M. Collyer, Chairman


Richard V. Backley, Commissioner


Frank P. Gestab, Commissioner


L. Clair Nelson, Commissioner

and safety of the miner, nor to dilute or weaken the obligation imposed on those persons ... When a mine operator engages a contractor to perform construction or services at a mine, the duty to maintain compliance with the Act regarding the contractor's activities can be imposed on both the owner and the contractor as operators ... Arguably, one operator may be in a better position to prevent the violation. However, as we read the statute ... Congress permitted the imposition of liability on both operators regardless of who might be better able to prevent the violation.

1 FMSHRC at 1483. In Phillips Uranium Corp., 4 FMSHRC 549 (1982) ("Phillips"), the Commission backtracked by selectively quoting Old Ben:

We previously have observed that "[i]n many circumstances... it should be evident to an inspector at the time that he issues a citation or order that an identifiable contractor created a violative condition and is in the best position to eliminate the hazard and prevent it from recurring."
1 FMSHRC at 1486.

4 FMSHRC at 553. No longer relying on statutory support, but instead criticizing the Secretary's adherence to "administrative convenience," id., the Commission vacated the citations, orders, and petitions for assessment of civil penalty issued to the owner-operator.

In this case, where Occidental's own employees were exposed to the hazard cited and where Occidental has impermissibly delegated its safety responsibilities via contractual assignment to Gilbert, the Commission has backtracked further. Having heeded the admonition in Phillips against proceeding only against the owner-operator but not the culpable independent contractor, the Secretary is now barred from proceeding against both. Apparently, now the Secretary cannot guess correctly against whom he may proceed. Borrowing an analogy used in other safety and health litigation by the U.S. District Court for the District of

1/ The principles of BCOA were subsequently reaffirmed by the U.S. Court of Appeals for the Fourth Circuit in Harman Mining Corp. v. FMSHRC, 671 F.2d 794 (4th Cir. 1971), and endorsed by the U.S. Court of Appeals for the Ninth Circuit in Cyprus Industrial Minerals Co. v. FMSHRC, 664 F.2d 1116, 1119-20 (9th Cir. 1981), quoting Republic Steel Corp., 1 FMSHRC 5 (1979).

2/ The criticism was directed towards the Secretary's then-existing policy to proceed only against an owner-operator.

No. 2142-73 (D.C.D.C. Oct. 1973),
the Commission's development of the law in this area is reminiscent of
Alice in Wonderland: each step forward brings us two steps backward.

My colleagues rely on the Secretary's enforcement policy to preclude enforcement against this owner-operator. Again they use selective quotation. Preceding the material from the guidelines cited by the majority is the following statement in the preamble to these regulations:

However, as was fully discussed in the preambles to the draft and proposed rules, the legislative history to the revised definition and the case law makes it clear that the production-operator remains ultimately responsible for the safety and health of persons working at the mine.

45 Fed. Reg. 44494 (1980). 3/ Further, and included in that enforcement policy itself, is the following:

MSHA's general enforcement policy regarding independent contractors does not change the basic compliance responsibilities of production-operators. Production-operators are subject to all provisions of the Act, standards and regulations which are applicable to their mining operation. This overall compliance responsibility of production-operators includes assuring compliance with the standards and regulations which apply to the work being performed by independent contractors at the mine. As a result, independent contractors and production-operators both are responsible for compliance with the provisions of the Act, standards and regulations applicable to the work being performed by independent contractors. [Emphasis added.]

45 Fed.Reg. 44497 (1980).

It is beyond dispute that under the 1977 Act, owner-operators are jointly and severally liable for violations involving independent contractors at their mines. As noted in Cyprus Industrial Minerals Co. v. FMSHRC, 664 F.2d 1116 (9th Cir. 1981),

[T]he addition of "independent contractors" to Section 3(d) [of the 1977 Mine Act] did not require the Secretary to cite only the independent contractor. The addition permitted the Secretary to cite the independent contractor, the owner or both. [Emphasis in original]

of the independent contractor violations under the Coal Act and the present Act.

664 F.2d at 1119 (citations omitted). The regulations at 30 C.F.R. Part 45 provide the mechanism for implementing independent contractor liability under the statute. It is clear from the preamble, as well as the policy statement, that production-operators are no less liable today than was the case prior to their issuance. However, the Secretary's guidelines are now being used by the majority to preclude enforcement. In Old Ben the Commission stated that the proper standard for reviewing Secretarial enforcement decisions "is for the Commission to determine whether the Secretary's decision to proceed against an owner for a contractor's violation was made for reasons consistent with the purpose and policy of the 1977 Act." 1 FMSHRC at 1485. In this case, it is the decision of the Secretary that is consistent with the purpose and policy of the 1977 Act, not the decision of the Commission majority.

MSHA's policy indicated that enforcement actions against production operators is "ordinarily appropriate," as a "general rule," under the following circumstances:

- (1) When the production-operator has contributed by either an act or an omission to the occurrence of a violation in the course of an independent contractor's work, or
- (2) when the production-operator has contributed by either an act or omission to the continued existence of a violation committed by an independent contractor, or
- (3) when the production-operator's miners are exposed to the hazard, or
- (4) when the production-operator has control over the condition that needs abatement.

The Secretary maintains, on the basis of record evidence, that the enforcement action against Occidental is consistent with the Act and the published guideline criteria. He makes specific reference to criteria 3 and 4 establishing exposure and control, with ample supporting citations to record testimony and exhibits. I agree that the record supports the Secretary on both grounds, but need go no further than criteria 3.

The contract between Occidental and Gilbert provided:

Contractor understands that operator and/or other contractors will be working in and around areas where work is to be performed under this contract.

(Exh. R-1 at 4). The evidence establishes not only that Occidental employees in fact regularly worked in the shafts under construction, but that Occidental ignored its statutory obligations to these same miners

Q. ... making, I do is make sure they are either correct or you will correct me. I have you down as saying in your testimony ... that you had no power to control safety underground.

A. That's right, other than contractually.

Q. Which you mean to say, you have every right to do under the contract?

A. Under the contract, I can go to Occidental management should a situation warrant.

Q. Now, as I read this contract, Occidental had employees under the ground; isn't that true?

A. They have shaft inspectors, true.

Q. So your testimony, that while they were underground, even though they were Occidental employees, you abdicated all responsibility for safety?

A. It is part of the Gilbert contract.

Q. That is not what I'm asking whether or not it was the contract. I just asked you what you did.

A. We did not actively inspect the shaft.

Q. Did you have a responsibility for safety then when they were underground?

A. For their's?

Q. Yes.

A. If you are speaking of the safety inspectors, they were under the full control of Gilbert.

Q. The shaft inspectors?

A. Yes.

Q. Do you assume their responsibility whatsoever for the safety of your employees while they are underground; is that your testimony?

A. Yes, we have got to do it that way.

Q. You did that pursuant to contract?

A. Correct.

Q. Irrespective of what the statutes might have said?

A. (No response.)

Q. It must be your testimony, that under the contract you had rights, regardless of what the statutes said, to do anything to protect the safety of your employees; is that true?

A. If that is a question, if they were in imminent danger I would expect them to get out of the shaft.

Q. That was your expectation?

A. Yes.

Q. If they thought they were in imminent danger situations?

A. Yes.

Q. Now, the people that were down there were safety inspectors to inspect the quality of workmanship, they weren't trained safety individuals, were they?

A. No.

Q. So whether or not they were in a hazardous situation, ma-

A. Of course, they weren't trained to recognize it.

Q. Whether or not they were trained for it though, you abdicated [sic] your responsibility, even though they weren't trained to work underground; isn't that true?

A. I don't believe that you are describing that correctly.

Q. Tell me how I am wrong.

A. They had to be accompanied by Gilbert employees to be there.

Q. Do they have to be accompanied by Gilbert safety officers?

A. The management of Gilbert's supervision has got to assume safety.

Q. Under the contract, as I understand it, Occidental had people down there to inspect materials furnished by Gilbert; isn't that true?

A. I believe that is a portion of their job.

Q. They had to inspect the workmanship performed by Gilbert?

A. That is true.

Q. They had the right to conduct inspections and they make test of the work performed by Gilbert?

A. That is true.

Tr. 60-63. The majority inexplicably finds this evidence regarding exposure of Occidental's quality inspectors inconclusive, notwithstanding McClung's acknowledgement that they were in the shaft and that responsibility for their safety was contractually assigned to Gilbert. McClung's testimony is corroborated by Occidental safety inspector Inman who testified that he had been "down the shaft" and that he had seen a shaft inspector in the V&E shaft "on the day that the citation was issued." Tr. 38. 4/ In addition, the MSHA inspector testified that he was told by miner Dyer, a quality inspector employed by Occidental, that "he spent everyday in the shaft ... wherever they [Gilbert employees] were working." Tr. 20-21. It is clear beyond peradventure that Occidental's miners were exposed to the hazards of this mine, and Gilbert's shaft sinking operations.

The majority also asserts, assuming arguendo that exposure to mine hazards by Occidental's shaft inspectors was established, that the Secretary's guidelines would be meaningless if "incidental" exposure (slip op. at 5) by Occidental's inspectors, for the purpose of monitoring Gilbert's work performance, was held to be sufficient to satisfy the exposure criterion. My colleagues would also find persuasive the fact that the relationship between Gilbert and Occidental is governed by contract. There is, of course, no statutory or other support for the suggestion that operator Occidental's statutory duty to maintain safe working conditions depends on the job classification of the exposed miner. Nor is there any suggestion in the preamble to Part 45, or in the enforcement policy itself, that degrees of exposure are even relevant. As to the majority's reliance on the contract between Occidental and Gilbert, it is elementary that a private agreement between parties cannot

control or alter statutory duties. An operator may not delegate statutory duty to prevent safety and health hazards, nor may the properly endorse contractual shifting of the strict liabilities by the Act, Congress, and the Courts. See Cyprus Industrial Mills FMSHRC, 664 F.2d 1116, 1119-20 (9th Cir. 1981), quoting Republic 1 FMSHRC 5, 11 (1979); Central of Georgia Railroad Company v. O F.2d 620, 624-5 (5th Cir. 1978); Frohlick Crane Service, Inc. v 521 F.2d 628, 631 (10th Cir. 1975).

In addition to rejecting this evidence establishing the ex Occidental's inspector miners to the hazards of the mine, the n also rejects record evidence establishing exposure to at least Occidental employee whose job it was to take gas samples in the Again, McClung's testimony is revealing:

- Q. What occasion would he have to go underground?
A. He [miner Parker] would go underground to--since were declared gassy in January of 1980, he would take samples and random gas samples.
Q. When you say we were classified as gassy?
A. The Cb tract, the Cathedral Bluffs.
Q. When you say Cb, you mean Cathedral Bluffs?
A. Yes.
Q. What then would be his duties after that shaft w classified as gassy?
A. What would be his duties?
Q. Yes.
A. Because we wrote the petition for the ventilatio he would have to assure that we had proper ventilati the area in the mine.
Q. Now, at the time the citation was issued, the Cb been declared gassy, had it not?
A. Yes.
Q. But at that time, you have just three developmen is that correct?
A. That is correct.
Q. So I assume that he would inspecting for methane accumulation in the shaft and in the stub landing al
A. Basically he checked return air and ventilation bottom of the shaft.
Q. And he was doing that prior to September of 1980
A. Yes, his job is basically that.

Tr. 48-9. In sum, the job of Occidental's employee was to take and check the ventilation system at the bottom of the shaft pu ventilation plan adopted by Occidental after this mine was dec by MSHA. His job function was therefore unrelated to contract

§ 57.21 Gassy mines

Gassy mines shall ... be operated in accordance with the mandatory standards in this section.

* * *

VENTILATION

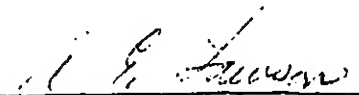
* * *

57-21-59 Mandatory. Preshift examinations shall be made of all working areas by qualified persons within 3 hours before any workmen, other than the examiners, enter the mine.

Gilbert had begun the shaft sinking operation in 1978 and had a continuous presence at the mine since that time. At the time of citation the shaft had been excavated by Gilbert to a level approximately 70 to 80 feet below the 1050 landing. The record does not indicate how long it had taken Gilbert to excavate from the 1050 level to that lower level or how long the cited landing had been unguarded. It is self-evident, however, that all of it could not have been accomplished since the last ventilation system preshift examination was conducted by Occidental's employee. There is no basis in this record to assume that Occidental had failed to meet its obligation to take regular "gas samples and random gas samples" in this gassy mine. Nor does this record suggest that under continued normal mining conditions the violation would have been abated before Occidental's employee performed additional ventilation checks and methane sampling. See U.S. Steel Mining Co., Inc., PENN 83-336 (July 11, 1984); U. S. Steel Mining Co., Inc., PENN 83-63 (August 28 1984).

Accordingly, based on the testimonial and documentary evidence of record, there is substantial evidence to support the Secretary's assertion that Occidental's employees were constantly exposed to the cited hazard. This enforcement action against Occidental is consistent with controlling precedent, the statute, the legislative history, the regulations and policy statement, and the facts before us.

I therefore dissent.


A. E. Lawson, Commissioner

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August 29, 1984

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

OLD DOMINION POWER COMPANY

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Docket Nos. VA 81-40-R
VA 81-65

DECISION

This consolidated proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act"). The major issue on review concerns whether the Department of Labor's Mine Safety and Health Administration ("MSHA") properly charged Old Dominion Power Company ("Old Dominion") with a violation of the Mine Act. A Commission administrative law judge answered this question in the affirmative. 3 FMSHRC 2721 (November 1981) (ALJ). For the reasons that follow, we agree, but conclude that a penalty lower than that assessed by the judge is appropriate.

On January 22, 1980, a fatal accident occurred at an electrical substation located on property leased by Westmoreland Coal Company ("Westmoreland" from Penn-Virginia Resources. The electrical substation is an open air facility enclosed by a wire fence, and is adjacent to a mine access road. Westmoreland paid for the construction of the substation, which is comprised of utility poles, power lines, transformers, an electric meter, and a meter box. Electricity is transmitted on incoming lines to the substation, where it is stepped-down, or reduced, and then transmitted to a coal mine operated by Elro Coal Company ("Elro"), which leases the mine from Westmoreland. The electricity is used to power Elro's coal producing equipment. Elro sells the coal it extracts to Westmoreland for resale to other customers.

Electricity at the mine site is provided by Old Dominion Power Company, a public utility doing business in southwest Virginia. Old Dominion transmits, distributes, and sells electricity. Although most of its customers are non-commercial, it sells electricity to some commercial and industrial customers. Old Dominion meters the electricity sold to its customers. Old Dominion installs, owns, and maintains all such meters which are regularly read by Old Dominion employees. Customers are billed on the basis of kilowatt hours used. In conformance with this practice, Old Dominion meters Westmoreland's substation. On a monthly basis an Old Dominion meter reader arrives at the

6 p.m. on January 21, 1980, by Westmoreland's electrical foreman, Terry Mullins. The next day, January 22, about 8:15 a.m., Mullins talked to [Old Dominion's] superintendent of meters, Jack Carr, on the telephone and expressed to Carr his doubts as to whether Old Dominion's meter at the substation was working properly because no light was visible in the meter and because the disk in the meter was turning counterclockwise. In Carr's opinion, the disk was supposed to turn counterclockwise, but, to make certain that there was nothing wrong with the meter, he sent two employees to the substation to check the meter. The two employees were James Harlow, a substation technician, and Leonard Lambert, a meter man, first class. Harlow had helped install the ... transformers and meter at the substation. Lambert would normally have participated in the installation, but he was on vacation when the equipment was originally installed sometime in December 1979. Lambert had, however, gone to the substation on January 21 and had installed a replacement meter.

When Harlow and Lambert arrived at the substation, Harlow, who was on the side of the van nearest to the substation, jumped out and looked at the fuse disconnects... . He was used to seeing the type of fuse link which is installed inside a tube. It was foggy and he did not see any tube or wire between the fuse holders or hanging down from the bottom holder, so he concluded that the substation was deenergized. [1/] Lambert took Harlow's word for the fact that the substation was deenergized. They did not at first go inside the fence around the substation to look at the meter because they concluded that the meter could not be checked while no power was flowing through it. Although the substation was energized and there was a hum coming from the transformers, they apparently did not hear the hum because of noise coming from a nearby generator.

1/ Old Dominion's general manager described the weather that day as "extremely bad ... [i]t was raining and fog was coming and going." Tr.

when it occurred to them that the GE transformers they had installed were of a new type and might have a rating of 5 KW instead of the 15 KW which they should have had. They decided to check the nameplate on the transformers to determine their classification. Harlow put on climbing equipment and went up the pole to examine the nameplate. He could not see the plate clearly because of water on it. He reached out with one hand to rub the water off the nameplate and was immediately electrocuted when his hand touched the energized transformer.

3 FMSHRC at 2724-25 (transcript citations omitted).

MSHA investigated the accident and determined that there had been a violation of 30 C.F.R. § 77.704, a mandatory mine safety standard. 2/ Then after, MSHA issued to Old Dominion a citation alleging a violation of that standard. 3/ Old Dominion contested the citation and a hearing was held. The administrative law judge concluded that Old Dominion was cited properly, affirmed the citation, and assessed a penalty of \$3,000 for the violation. We granted Old Dominion's petition for discretionary review and heard oral argument. 4/

The primary issue before us is whether, on the facts of this case, Old Dominion properly was found to be subject to the Mine Act. That determination must be made through interpretation and application of sections 3(d), 3(h)(1) and (2), and 4 of the Act. 30 U.S.C. §§ 802(d), (h)(1) and (2), and 803. For ease of reference we set forth the sections below:

2/ The standard states in part: "High voltage lines shall be deenergized and grounded before work is performed on them." There is no dispute that the terms of the standard were violated by the conduct of Old Dominion's employees.

3/ As stated by the judge, "[c]onfusion arose as to which entity should be cited for the violation because Elro Coal Corporation was using the power received at the substation, Westmoreland owned and operated the substation, and [Old Dominion's] employees did the work which caused the fatal accident." 3 FMSHRC at 2726 (transcript citation omitted). MSHA originally cited Elro. In April 1980, however, the citation was modified to name Westmoreland as the responsible operator. Finally, in January 1981, the citation was again modified to charge Old Dominion for the violation. The Department of Labor's Occupational Safety and Health Administration ("OSHA") also investigated the accident but took no enforcement action.

4/ In view of the nature of the issue presented, we requested additional industry and labor viewpoints to assist us in our deliberations. The Edison Electric Institute ("EEI") thereafter participated as an amicus curiae.

Sec. 3. For the purposes of this Act, the term -

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(d) "operator" means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine;

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(h)(1) "coal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid or if in liquid form, with workers underground, or used or to be used in, the milling of such minerals, or the of preparing coal or other minerals, and includes custom preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.

(h)(2). For purposes of titles II, III, and IV, "coal mine" means an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities; .

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the Mine Act. Old Dominion attempts to differentiate portions of the geographic tract of land leased by Westmoreland Coal Company into "mine" and "non-mine" areas. It asserts that that portion of land at which coal was actually extracted from the ground is a "mine," whereas other areas somewhat removed in distance from the specific extraction locale, including the area of land on which the substation is located, should not be interpreted as being a mine or a part thereof. This narrow view of what constitutes a mine conflicts with the Act's expansive definition set forth above. Sections 3(h)(1) and (2)'s broad definition of coal mine undoubtedly covers a portion of a geographic tract of land leased to a coal operator on which is located an electrical substation providing power for mining operations on that same tract of land. The substation certainly qualifies as an "area of land," or a "structure," "facility," "machinery," "equipment," or "property" on such land, "used in ... the work of extracting coal." See Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 1 ("Legis. Hist."). ("[I]t is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and it is the intent of the Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.") See Donovan v. Carolina Stalite Co., 734 F.2d 1077 (D.C. Cir. 1984), and cases cited therein. We therefore conclude that the substation is part of a coal mine and that the Mine Act and its standards can be applied to regulate working conditions at that site.

Because it is not disputed that a violation of the cited MSHA standard occurred in the course of work performed by Old Dominion employees, our inquiry is whether Old Dominion was properly cited under the Mine Act for this violation. Section 4 of the Mine Act places the responsibility for compliance on mine "operators." Therefore, Old Dominion can be cited for a violation only if, on the facts of this case, it is an "operator." Section 3(d) defines an operator as "any owner, lessee, or other person who leases, operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine." We conclude that, on the facts of this case, Old Dominion was an independent contractor performing services or construction at the mine and, therefore, was properly cited for the violation committed by its employees.

As part of the 1977 amendments to the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1969) (amended 1977) ("Coal Act"), the phrase "any independent contractor performing services or construction at such mine" was added to the Coal Act's definition of operator. The amendment was intended "to settle an uncertainty that arose under the Coal Act, i.e., whether certain contractors are 'operators' within the meaning of the Act," and "to clearly reflect Congress' desire to subject contractors to direct enforcement of the Act." Old Ben Coal Co., 1 FMSHRC 1480, 1481, 1486 (October 1979). Accord, Phillips Uranium Corp., 4 FMSHRC 549, 552

as an "independent contractor" as that term is commonly used at law. Pursuant to contract Old Dominion is granted an easement to construct and maintain electric power and transmission lines on and over the mine operator's property. Substations on the property and "other points to be later designated" are to be provided power by Old Dominion. The mine operator has the contractual right "to connect any additional electric power or transmission lines, from time to time, with any line or lines of [Old Dominion]." In order to determine the amount of electricity used by the mine operator and the payment due, Old Dominion "has the privilege of metering each delivery point," and it does so on a monthly basis. In order to perform such metering, Old Dominion has access to mine property and its own key to the substation. Thus it is clear that Old Dominion has a contractual obligation with Westmoreland and the requisite freedom from control in performing its obligation, and was serving as an independent contractor.

By its terms, however, the Mine Act is applicable to independent contractors "performing services or construction" at a mine. Old Dominion urges that this language limits the reach of the Mine Act to less than all "independent contractors," and that it is beyond that limit. We next examine whether Old Dominion was "performing services or construction" within the meaning of section 3(d). "Service" has been defined to include: "the performance of work commanded or paid for by another"; "an act done for the benefit or at the command of another"; and "useful labor that does not produce a tangible commodity." Webster's Third New International Dictionary (Unabridged) 2075 (1971). Pursuant to its contract with the mine operator, Old Dominion provided electricity at a suitable voltage and metered its consumption for billing. Old Dominion also provided labor to maintain the electrical system, including its meters and transformers as well as equipment owned by the mine operator, in proper and safe working condition. Old Dominion's employees had helped install the transformers at the substation, and had installed a replacement meter. 3 FMSHRC at 2424. At the time of the events at issue, Old Dominion was at the mine site at the behest of the mine operator to check the equipment to determine whether it was functioning properly and, if necessary, to replace any defective components. In our view, the work performed by Old Dominion constitutes the performance of a service and places it within the literal terms of section 3(d). 5/

We find it unnecessary to decide in this case whether "there may be a point ... at which an independent contractor's contact with a mine is so infrequent or de minimis that it would be difficult to conclude that services are being performed." National Industrial Sand Assoc. v. Marshall, 601 F.2d 689, 701 (3d Cir. 1979). See also Legis. Hist., supra at 602, 11315. Rather, we conclude that, if there is a point at which the literal reach of section 3(d) must be tempered, that point is not reached under

5/ Based on our conclusion that Old Dominion was performing services, we need not inquire further as to whether Old Dominion's work also

made, and responded to, in accordance with a longstanding, and regularly maintained, business relationship defined by a written contract entered into in 1952 as well as custom and practice. The services or work to be rendered by Old Dominion included examination of an electrical facility providing power to the mine and the performance of any necessary repairs, services essential to the mine's operation. Old Dominion's assistance to Westmoreland in installing, maintaining, repairing, and replacing electrical equipment had been rendered in the past, was being rendered at the time of the events at issue, and was to be anticipated in the future. The extent of Old Dominion's contact with the mining process cannot be viewed as de minimis. Accordingly, we conclude that in these circumstances, Old Dominion is properly subject to MSHA standards regulating safe performance of electrical work on mine sites.

We emphasize that by citing Old Dominion for the violation committed by its employees, the Secretary has acted in accordance with the Commission's longstanding view that the purpose of the Act is best effectuated by citing the party with immediate control over the working conditions and the workers involved when an unsafe condition arising from those work activities is observed. Old Ben, supra; Phillips Uranium, supra. By citing the operator with direct control over the working conditions at issue, effective abatement often can be achieved most expeditiously. Id. Citation of Old Dominion is also consistent with the Secretary's conclusion, after rulemaking, that "the interest of miner safety and health will best be served by placing responsibility for compliance ... upon each independent contractor." 45 Fed. Reg. 44494, 44495 (July 1, 1980).

Old Dominion argues that its work activities, whether on or off a mine site, should be regulated pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. (1982) ("OSHAct"). The Secretary of Labor enforces both the Mine Act and the OSHAct and has considerable administrative discretion in determining which of the two statutes should be applied in circumstances where either reasonably could be applied. In the present case the Secretary has made the determination that compliance with the standards promulgated under the Mine Act is preferable, and this determination is entitled to deference. Nor does the Secretary's decision to proceed under the Mine Act run counter to the dictates of the OSHAct, which anticipates the potential for overlapping agency jurisdiction and eliminates the potential conflict by providing that the OSHAct shall not apply to "working conditions of employees with respect to which other federal agencies ... exercise statutory authority to prescribe or enforce standards ... affecting occupational safety and health." 29 U.S.C. § 653(b)(1). Here, MSHA has statutory authority and has exercised that authority under the Mine Act.

We note that amicus curiae EEI has initiated discussions with the Secretary concerning whether regulation by OSHA of the work activities of electrical utilities on mine sites, rather than by MSHA, is more appropriate.

Old Dominion responsible for the violative act committed by its employees is within his statutory authority, is consistent with the purposes and policies of the Act, and should not be disturbed.

We address three other challenges raised by Old Dominion to the legality of the Secretary's issuance of the citation. Old Dominion argues that the Secretary's definition of "independent contractor" at 30 C.F.R. § 45.2(c) has been applied to it in an arbitrary and capricious manner, and that proper application would not result in its designation as an independent contractor. ^{6/} We disagree. On its face the regulation simply incorporates the definition of "person" in section 3(f) of the Mine Act, 30 U.S.C. § 802(f), with the definition of "operator" in section 3(d). As such, the regulation does not differ substantively from the terms of the Act itself, and the reach of the regulation is coextensive with the Mine Act.

Old Dominion also argues that the language of a continuing resolution on appropriations, enacted on December 15, 1981, sheds light on the question of the Mine Act's coverage of its activities. H.J. Res. 370, 95 Stat. 1183 (1981), provided funding for a portion of fiscal year 1982 to various federal agencies and departments. In part, the resolution prohibited MSHA from enforcing the Mine Act "with respect to any independent construction contractor who is engaged by an operator for the construction, repair or alteration of structures, facilities, utilities ... located on (or appurtenant to) the surface areas of any coal or other mine, and whose employees work in a specifically demarcated area, separate from actual mining or extraction activities." H.J. Res. 370, § 132, 95 Stat. 1199 (1981). We conclude that this provision has no bearing on the question before us. The violation, the Secretary's citation of Old Dominion, the hearing below, and the administrative law judge's decision all preceded the enactment of the continuing resolution. "Resolution 370 did not otherwise vitiate the force of the original authorization. Mine operators subject to the Act remained under the same substantive legal obligations, the implementing standards and regulations promulgated under the Act remained in force; and the statutory basis for enforcement litigation remained in effect." Carolina Stalite Co., 734 F.2d at 1558. See also Secretary on behalf of Cooley, 6 FMSHRC 516, 525 n. 3 (March 1984). Also, "[w]hatever enforcement powers it took from MSHA were returned to the agency when Res. 370 was superseded seven months later by a supplemental appropriations bill. H. R. 6685, § 204, 96 Stat. 180, 192 (1982)." Carolina Stalite, 734 F.2d at 1557 n. 15.

^{6/} 30 C.F.R. § 45.2(c) provides:

"Independent contractor" means any person, partnership, corporation, subsidiary of a corporation, firm, association or other organization that contracts to perform

the citation must be dismissed because it was not issued to Old Dominion with "reasonable promptness" after the occurrence of the violation. As previously set forth in note 3, although the violation occurred in January 1980, a citation was not issued to Old Dominion until January 1981. Section 104(a) of the Mine Act requires that "[i]f ... the Secretary ... believes that an operator ... has violated this Act, or any mandatory ... standard, ... he shall, with reasonable promptness, issue a citation to the operator." 30 U.S.C. § 814(a). Old Dominion asserts that the one-year delay before it was cited violates section 104(a)'s mandate. This argument ignores the effect of the last sentence of section 104(a): "The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act." The Mine Act's legislative history explains:

There may be occasions where a citation will be delayed because of the complexity of issues raised by the violations, because of a protract[ed] accident investigation, or for other legitimate reasons. For this reason, section [104(a)] provides that the issuance of a citation with reasonable promptness is not a jurisdictional prerequisite to any enforcement action.

Legis. Hist., at 618. The administrative law judge accurately described the development of the case law concerning independent contractor liability and the course of MSHA's rulemaking activities during the time of the events at issue. See 44 Fed. Reg. at 44494. The legal issue posed here concededly is novel. Most important, however, Old Dominion has not shown that it was prejudiced by the delay. Indeed, Old Dominion was aware from the time of its employee's fatal accident that an investigation involving its actions was being conducted by MSHA, and it has been given a full and fair opportunity to participate in all stages of this proceeding. Accordingly, we affirm the judge's rejection of Old Dominion's argument that the citation must be dismissed because of the delay in its ultimate issuance to Old Dominion.

Old Dominion's final argument is that, even if it was cited properly for the violation, no penalty for the violation should be assessed because the employees' violative actions were beyond its control and could not have been foreseen. In particular, Old Dominion argues that the judge's findings concerning its negligence are not supported by the record. We reject Old Dominion's argument that no penalty should be assessed. "[B]oth the text and legislative history of section 110 [of the Mine Act] make clear that the Secretary must propose a penalty assessment for each alleged violation and that the Commission and its judges must assess some penalty for each violation found." Tazco, Inc., 3 FMSHRC 1895, 1897 (August 1981). We conclude, however, that Old Dominion does not support the judge's findings concerning

The appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation." 30 U.S.C. § 820(1). Only the judge's findings regarding negligence are at issue on review.

The MSHA inspector who issued the citation found that the violation "could not have been known or predicted, or occurred due to circumstances beyond the operator's control." The inspector further remarked that "the employees were told the substation was energized before they left their duty station." Exh. 3 (Inspector's Statement). Yet, the judge proceeded to find the operator negligent. This finding was based primarily on two conclusions he drew from the evidence: (1) Old Dominion failed to instruct the employees properly before they were dispatched to the substation; and (2) Old Dominion knew or should have known that the deceased employee "had a proclivity for cutting corners [and] disobeying safety regulations." 3 FMSHRC at 2743. We conclude that these findings are not supported by substantial evidence of record.

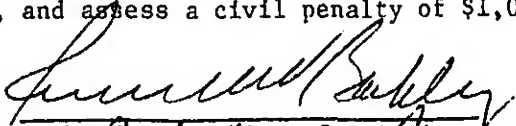
The surviving employee, Lambert, testified that Old Dominion's meter superintendent, Jack Carr, told him on the morning of January 22 that Westmoreland's electrical foreman had informed Carr that he thought a light was out in the substation's meter and that a transformer might be bad. Lambert also testified that Carr told him that the substation had been energized. Old Dominion's general manager testified that Harlow and Lambert had been told before going to the substation that it was energized. Thus, the record establishes that Harlow and Lambert were told specifically that the substation was energized, the meter might not be functioning properly, and a transformer might be bad.

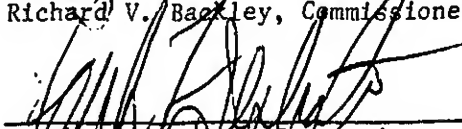
We have held previously, for purposes of considering the section 110(1) penalty criteria, that when a rank-and-file employee's actions violate the "the operator's supervision, training and disciplining of its employees must be examined to determine if the operator has taken reasonable steps to prevent the rank-and-file miner's violative conduct." Southern Ohio Coal Co. 4 FMSHRC at 1459, 1463-64 (August 1982) (emphasis in original); A.H. Smith Stone Co. 5 FMSHRC 13, 15 (January 1983). The Secretary elicited no evidence that Old Dominion's supervision, training or disciplining of its employees was inadequate. Nor did he attempt to further demonstrate what Old Dominion should have done to meet its duty of care. There is, for example, no testimony concerning Old Dominion's customary procedures in such a situation or analogous procedures in the industry. The MSHA inspector's testimony was restricted to the negligent actions of the employees themselves. Meter superintendent Carr neither testified nor was deposed. The only testimony regarding Old Dominion's safety procedures was given by Old Dominion's general manager who testified as to the comprehensiveness of the company's program, the experience of Harlow and Lambert, and the specific safety directive which prohibits Old Dominion employees from

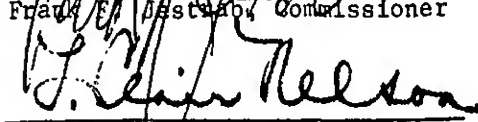
The judge's further finding that Old Dominion should have known Harlow had a proclivity for unsafe acts also lacks adequate evidentiary support. The judge based his finding upon events which occurred the day of the accident, after Harlow had left management's direct supervision. The appropriate question is whether management reasonably could have foreseen Harlow's negligent conduct. The record contains no evidence of past unsafe conduct by Harlow or of a careless attitude on his part. In fact, the only evidence of Harlow's conduct before the fatal accident suggests that Old Dominion had reason to believe Harlow was concerned with safety. Old Dominion's general manager described Harlow as a "very capable" and "safety conscious" employee, who had missed only three safety meetings in the past 10 years. Tr. 66, 69-70. Lambert described him as "one of the most safety conscious men we had." Tr. 91. We therefore conclude that substantial evidence does not support the judge's finding that Old Dominion knew or should have known that Harlow would act in an unsafe manner while engaged in the work which resulted in a fatal accident.

Because, based on the above, we conclude that substantial evidence of record does not support the judge's finding that Old Dominion was negligent, we must modify the penalty assessed by the judge. Southern Ohio Coal Co., 4 FMSHRC at 1465. Old Dominion has not contested the judge's findings that it is a large operation; that payment of civil penalties under the Act will not affect its ability to continue in business; that it has no history of prior violations; that a good faith effort to achieve abatement was made; and that the gravity of the violation was extremely serious. Given these findings and our conclusion that negligence was not established, we find that a penalty of \$1,000 is appropriate and consistent with the Act.

Accordingly, we affirm the judge's conclusion that, on the facts of this case, Old Dominion is an independent contractor and an operator within the meaning of section 3(d) of the Mine Act, and was properly cited for the violation of 30 C.F.R. § 77.704. We vacate the judge's finding of negligence and his assessment of a \$3,000 penalty, and assess a civil penalty of \$1,000.


Richard V. Baxley, Commissioner


Frank E. Best, Commissioner


L. Clair Nelson, Commissioner

The Commission is in agreement that Old Dominion is an independent contractor and an operator within the meaning of the Act. There is also no dispute that Old Dominion violated the Act and that such violation resulted in the death of miner James Harlow. However, as in Southern Ohio Coal Co., 4 FMSHRC 1459 (August 1982) and U.S. Steel Corp., 6 FMSHRC 1423 (June 1984), I dissent from my colleagues' reduction of the penalty imposed. Here, as there, the majority finds, without explanation, "...that a penalty lower than that assessed by the judge is appropriate." Going beyond even the generous dispensations granted the violative operator in those cases, they have reduced by two-thirds the exceedingly moderate penalty set by the judge below. And, once more, the majority has failed to provide a reasoned analysis to support reducing the penalty to \$1000 for the miner killed as a consequence of this violation.

Old Dominion's employee was electrocuted because he concluded erroneously that the substation was not energized. He reached this conclusion because he looked for but did not see the barrel fuse disconnect that was customarily used when energizing substations. His fellow miner, William Lambert, also looked and failed to observe the anticipated disconnect. Because of this, they were unaware that the substation was energized, since Westmoreland's electrical foreman had installed a different type fuse link when he energized the substation the day before this fatality took place. It is undisputed that Harlow and Lambert were told at the time they were given their work assignment that the substation was energized. It is also undisputed that Old Dominion had never energized a substation without the use of a barrel fuse. However, Old Dominion did not energize this substation, Westmoreland did.

The testimony of Old Dominion's General Manager, H. E. Armsey, is revealing:

Q. Would you explain what the investigation revealed that Mr. Harlow thought or saw when he looked at these?

A. Yes, sir. In our operation there is a barrel that would fit between these two termination points that would include a fuse link. And if there is no connection between the upper terminal and the lower terminal, then it is thought that the facility is de-energized and that there is an air gap there. But during the investigation it would [sic] found that there was a physical connection through the utilization of a fuse link rather than the fuse barrel.

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which contains little fuses down here?

A. Yes, sir.

Q. And they would be enclosed inside a barrel, like that.

A. That is correct.

Q. And these barrels were all gone? There were none there? There were just none there?

A. That is correct.

Q. But your investigation determined that just the little wire which normally is inside it had been wired across?

A. That is correct.

Q. So when Mr. Harlow looked up there, he didn't see this...the barrel because it wasn't there and he didn't see this but it was there?

A. That is correct.

Tr. at 53-4

Q. So the best that you can determine is, the cause of Mr. Harlow's death is because he thought there was no energy because this is missing?

A. He was looking for a big barrel and he didn't see it and didn't recognize the fact that there was a jumper across what ordinarily would be a path used here. And he said that the substation was de-energized, even though he had been told before they left the storeroom that the substation was energized.

Tr. at 61-2 (emphasis added).

The corporate negligence of Old Dominion is thus directly established in this case because of its failure to ascertain the type of installation at the assigned worksite before its employees were dispatched to "check our equipment" (Tr. 82). This failure to instruct Harlow and Lambert as to the equipment and conditions they would encounter resulted in the death of miner Harlow, as the judge below found. As noted in my dissenting opinion in Southern Ohio Coal Co., "[w]hile one can perhaps conceive of a case in which the only negligence could be that of the rank and file miner, this is not that case." 4 FMSHRC at 1471 (emphasis in original).

Old Dominion argues that the violative conduct of its employees was unforeseeable and beyond its control. To the contrary, Old Dominion failed to determine the type of fuse connection used by Westmoreland at this minesite. Harlow and Lambert thus looked for and did not see the barrel disconnect that Old Dominion had--without exception--installed in

from those in positions of supervisory responsibility. This operator failed to meet that responsibility, which does not terminate merely because the employee is out of sight. Having failed to ascertain before these miners were dispatched to this substation to work on a 12,000 volt system whether the fuse connection installed by Westmoreland was of the standard configuration with which its employees were familiar, Old Dominion cannot now be permitted to escape the consequence of its negligent inaction. The combination of supervisory and non-supervisory negligence in this case proved disastrous.

18.

My colleagues reject the bases for the judge's finding of negligence, the only challenged aspect of the judge's analyses of the statutory penalty assessment criteria set forth in section 110(i) of the Act. They then substantially reduce the penalty imposed. ^{2/} However, the decision below does not suggest, much less state, that any dollar, percentage, or other numerical value is assigned to the "negligence" criteria. The judge's conclusion that the violation was extremely serious, a gravity determination that is not disputed, would itself support the judge's penalty assessment. Nevertheless, the majority does not independently evaluate Old Dominion's negligence on the basis of record evidence or cure what it views as deficiencies in the judge's opinion by itself assigning numerical or other objective indicia to the penalty assessment factors. Rather, my colleagues' opinion is entirely silent as to the dollar amounts to be assigned to five of the section 110(i) criteria, although it does not dispute the gravity of the violation--obviously maximum in view of the death of miner Harlow. No future guidance is therefore furnished to mine operators or the Secretary. Conclusorily glossing over the two-thirds penalty reduction falls far short of being statutorily satisfactory or in accord with the Act.

The Act establishes a standard of strict liability for violations thereof, i.e., no fault or negligence is required to establish a violation. Here, however, it is unquestionable that there was a violation of the Act, and both supervisory as well as non-supervisory miner negligence. It is a truism that a corporation can only act through its employees, and nowhere in the Act, the legislative history, or our precedents is there any suggestion that operator negligence is to be disregarded if attributable in part to a non-supervisory miner. To artificially allocate penalty dollars between an operator and its employee miners provides a ready avenue for an operator to escape penalties and their intended deterrent effect. The operator which structures its operation to avoid supervisory responsibility will now be rewarded. Neither the resulting reduced penalty nor this denied supervision is in accord with the intent of the Act and with the mandatory penalty assessment processes required by the Act:

^{2/} The majority in this case goes out of its way to reduce the penalty set by the judge below, notwithstanding the fact that the operator's petition

providing a means for the avoidance or drastic reduction of penalties cuts compliance by weakening the strict liability and stringent penalty established by the Mine Act. The majority's importing of a tort standard of liability into the penalty sections of the Act, with all its attendant complexities, is to graft on to our statute concepts never envisioned by its drafters. Although my conclusion regarding Old Dominion's negligence in this matter is based on considerations somewhat different from those utilized by the judge, the result is the same. For the reasons set forth above, and as the judge below found, the majority's conclusion that substantial evidence does not support a finding that the actions of management, or lack thereof, contributed to the violation of the Act, is thus in error. 3/

The penalty assessed by the judge, based in major part on the high degree of the violation, is in accord with the congressional intent expressed in the Mine Act's legislative history. Legis. Hist. at 603, n. 10. As the Senate Committee Report notes:

In short, the purpose of a civil penalty is to induce those officials responsible for the operation of a mine to comply with the Act and its standards.

* * *

In overseeing the enforcement of the Coal Act the Committee has found that civil penalty assessments are generally too low, and when combined with the difficulties being encountered in collection of assessed penalties...the effect of the current enforcement is to eliminate to a considerable extent the inducement to comply with the Act or the standards, which was the intention of the civil penalty system.

S. No. 95-181, Legis. Hist. at 629 (emphasis added).

Returning substantial evidence has been unsuccessfully attempted by the Commission before, to its subsequent embarrassment. As the Court of Appeals for the District of Columbia Circuit stated:

[T]he Commission is statutorily bound to uphold an ALJ's factual determinations that are supported by substantial evidence.

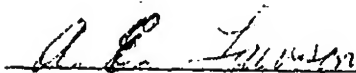
The determination of the amount of the penalty that should be assessed for a particular violation is an exercise of discretion by the trier of fact. Cf. Long Manufacturing Co. v. OSHRC, supra, 554 F.2d [903] at 908 [8th Cir. 1977]. This discretion is bounded by proper consideration of the statutory criteria and the deterrent purpose underlying the Act's penalty assessment scheme.

Sellersburg Stone Co., 5 FMSHRC 287, 294 (March 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984). As in Sellersburg,

Although the penalties assessed by the judge far exceed those proposed by the Secretary before hearing, based on the facts developed in the adjudicative record [I] cannot say that the penalties assessed are inconsistent with the statutory criteria and the deterrent purpose behind the Act's provision for penalties. Hence, [I] find that the judge's penalty assessments do not constitute an abuse of discretion.

Id. at 295, quoted in part, 736 F.2d at 1153.

I therefore dissent to the reduction of the penalties imposed.



A. E. Lawson, Commissioner

colleagues and I agree that the fatal accident which led to litigation occurred at the site of a mine. Therefore, actions of the Mine Safety and Health Administration of the Department of Labor properly cover all activities at the Elro mine. While amicus curiae Edison Electric Institute has very serious questions about application of MSHA standards to high voltage power lines, such questions must be resolved in the first instance between the industry and the Department.

However, my colleagues also decide today that a power company's metering of electrical usage by a mine is sufficient to bring the power company itself into an operator under the Mine Act. By the adoption of this decision, the majority implicitly holds that every vendor who approaches mine property is a mine operator subject to all of the requirements of the Act. This, I believe, will be news to all public utilities, to other mine operators - and to the Congress of the United States. I dissent.

My colleagues have glossed over the facts of Old Dominion's relationship with Westmoreland because those facts hamper the analysis which they reach their result. However, on the facts stated in this record, I conclude that Old Dominion acted as a consumer of electricity, not a provider of services at the Elro mine. The contrary decision of the majority is reached on the basis of conjecture and a stretching of the record testimony which I cannot agree.

The facts are undisputed. Westmoreland Coal Company leased its land holdings to Elro Coal Company to mine coal at a new mine. The mined coal was to be sold by Elro to Westmoreland. In preparation for the new mine, Elro contracted with the Vanderpool Electric Corporation to build transmission lines from Old Dominion's power lines to Westmoreland property where a substation was to be built. Old Dominion had nothing to do with building transmission lines to the substation. Westmoreland then connected to the Elro substation to reduce the incoming power to the voltage for use in the mine. The reduction in power was accomplished by large transformers. Old Dominion had nothing to do with the ownership or construction of the substation. In April 1979, when the substation was completed, Old Dominion installed metering equipment - and only metering equipment - at the substation for its billing purposes, so that it could measure the amount of electricity used by Westmoreland and Elro. Metering equipment required five smaller transformers to

monthly basis. The substation had been energized for one day at the time of the accident, which occurred when Old Dominion employees came to the site to check the operation of the meter.

On these bare facts, the majority erroneously concludes that Old Dominion was providing the requisite services under Section 3(d) of the Mine Act to transform the public utility into a mine operator.

I cannot agree that Old Dominion was "providing services" for Westmoreland or Elro at this substation. The power company metered electricity usage for its own billing purposes, not for any purposes of the production operators. All the ownership, construction, maintenance, operation and repair of the substation were solely under Westmoreland's control. Old Dominion installed its meter not to "provide services" to the mine, but solely in order to measure the quantity of electricity that it, as a vendor, sold to the mine.

The majority opinion skips over these crucial distinctions by concluding:

The services or work to be rendered by Old Dominion included examination of an electrical facility providing power to the mine and the performance of any necessary repairs, services essential to the mine's operation. Old Dominion's assistance to Westmoreland in installing, maintaining, repairing, and replacing electrical equipment had been rendered in the past, was being rendered at the time of the events at issue, and could be anticipated in the future.

Dec. at 7. The totality of evidence relating to the "examination" of this substation by Old Dominion does not support the majority's conclusion and, in fact, underscores that Old Dominion's sole interest at the substation was in its own metering equipment.

Q. Would [a meter reader on the monthly visit] perform any inspection or services over the other five articles?

A. Only visual and only by probably a meter reader that is not a meter man. He might check the general appearance of the equipment to see if there was anything that he saw that was out of line or might need attention.

Tr. 36 (emphasis in original). My colleagues turn this limited testimony about a visual inspection of "five articles" into a service performed for Westmoreland. This is not an accurate

...by Old Dominion so that electricity could pass through the meter without damage to the meter. Any "examination" that would occur would be only a visual check of Old Dominion's own equipment, used exclusively to meter the mine's use of electricity. Such an "examination" would not provide any advice to the mine operator, but only to the vendor.

Uncontradicted testimony consistently limited the power company's role at the Elro substation to its metering equipment. Dominion General Manager H. E. Armsey testified that Old Dominion would not be involved in repair and restoration of equipment at the substation after an industrial accident or weather damage unless there were a problem involving the metering equipment.

If the Elro mine lost power, Elro would call Westmoreland because Westmoreland has the inhouse expertise. While Armsey testified that if Westmoreland had questions itself, it would be "unusual" for it to call Old Dominion, that was because "if the mine doesn't run, we don't sell electricity." Tr. 38. I cannot agree with the apparent conclusion of my colleagues that an unspecified occasion of major difficulty with the substation at some time in the future, which may lead Westmoreland to seek assistance from Old Dominion, and which advice the power company may provide in order to continue to sell electricity, is sufficient justification of services to turn Old Dominion into a mine operator.

The limited involvement of Old Dominion with the Elro substation was clearly explained in uncontradicted testimony by Dominion General Manager Armsey:

Q. And at this substation what facilities or what properties did Old Dominion have there?

A. Our only facilities were the metering equipment which measures the energy that would be used at this location.

*

*

*

Q. Who has the responsibility to maintain this substation and the transmission lines in and lines out?

A. Someone other than Old Dominion Power Company. We weren't involved with the transmission line and substation.

7. This degree of presence by Old Dominion at the substation would be less than that of a service representative from

gress intended this result.

To the contrary, Congress clearly excepted vendors such as Old Dominion from the reach of the definition of "operator." As even the Secretary of Labor recognized throughout most of the tortuous history of his independent contractor regulations, Congress intended that the only mine contractors who could be held liable as operators were those having some continuing presence at a mine site. In the Supplementary Information accompanying MSHA's initial independent contractor proposed rule, the Secretary specifically noted that:

Congress' intention that the Act be enforced against independent contractors that have a continuing presence at a mine is explicitly stated in the legislative history. The Conference Report provides that inclusion of independent contractors in the definition of operator was intended to permit enforcement of the Act against independent contractors "who may have a continuing presence at the mine." S. Rep. No. 95-461, 95th Cong., 1st Sess. 37 (1977).

44 Fed. Reg. 47746, 47748 (Aug. 14, 1978) (emphasis added). As the Secretary additionally recognized, limiting the statutory term "operator" to those independent contractors who have a significant degree of involvement in mine operations is also consistent with judicial constructions of the Mine Act. For example, the Third Circuit has pointed out:

The reference made in the statute only to independent contractors who "perform services or construction" may be understood as indicating, however, that not all independent contractors are to be considered operators. There may be a point, at least, at which an independent contractor's contact with a mine is so infrequent or de minimis that it would be difficult to conclude that services were being performed. Such a reading of the statute is given color by the fact that other persons deemed operators must "operate[], control[], or supervise[]" a mine. Designation of such other persons as operators thus requires substantial participation in the running of the mine; the statutory text may be taken to suggest that a similar degree of involvement in mining activities is required of independent contractors before they are designated operators.

National Industrial Sand Association v. Marshall, 601 F.2d 689, 701 (1977) (emphasis added). See also, Association of Bituminous Contractors, Inc. v. Andrus, 581 F.2d 852, 853 (5th Cir. 1978).

abandoned the requirement that an independent contractor have a continuing presence at a mine in order to be considered an operator. In the preamble to the final rule, the Secretary stated that "as a general rule, MSHA will issue citations . . . to independent contractors for violations . . . committed by them and their employees." 45 Fed. Reg. 44494 (July 1, 1980). In support of this broad statement, the Secretary said that "MSHA has concluded that a regulation that would distinguish some contractors from others in formulating a comprehensive enforcement scheme could, at this time, be overly complex, imprecise and lead to arbitrary decisions" 45 Fed. Reg. at 44495. To the extent that the final rule is not reconciled by the Department of Labor and this Commission with the express Congressional intention that only those contractors with a "continuing presence" at a mine site be considered operators, it reflects an erroneous and over-reaching reading of the Act.

Whatever the merit to the Secretary's decision that it would be less complex and, thus, more administratively convenient to consider all independent contractors as operators, that convenience cannot legally override Congress' express distinction between those contractors who can be cited as operators (contractors "providing services or construction" with a "continuing presence") and those who cannot (all others).

By its definition of services ("an act done for the benefit of another at the command of another"), the majority includes the apocryphal Coca Cola man coming onto mine property to refill the soda machine in the office. While I was once confident that the majority would, if asked directly, agree that the Coca Cola company and the Xerox Corporation are merely vendors, not mine operators, the majority decision fails to provide any basis for such a distinction and, in fact, negates the Congressional directive. In order to include this power company within the statutory definition, the majority has had to stretch the definition so far that it will now encompass every vendor approaching mine property.

I would hold that the Secretary erroneously cited a non-operator and would vacate the citation and penalty. I dissent from the majority's failure to do so.

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August 30, 1984

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
	:	
v.	:	Docket Nos.
	:	
UNITED STATES STEEL CORPORATION	:	

DECISION

This consolidated proceeding arising under the Occupational Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982 interpretation and application of 30 C.F.R. § 55.15-15.15 personal protection standard. 1/ The Commission's administrative proceeding concluded that U.S. Steel Corporation ("U.S. Steel") violated the standard and assessed a civil penalty. 4 FMSHRC 11C. For the reasons that follow, we affirm the judge's decision in part.

The events at issue in this proceeding occurred at the Mountaintop Mine iron ore preparation plant in Mountain View, West Virginia. This plant U.S. Steel produces taconite pellets, a high iron concentrate used in making steel. After iron ore is crushed to marble-sized taconite pellets during the agglomeration process, the pellets are discharged into a large doughnut-shaped installation, about 56 feet in diameter where the hot taconite pellets are cooled on a circulating system of a series of metal grates, called pallets. Each pallet is about 8 feet long and widens from about 5 feet at its inner end to just under 7 feet at its outer end.

When the cooling cycle is almost complete a pallet moves to an upright position and tips the cooled pellets into a bin located below the pallet. There is only one opening to the bin and each pallet pivots open in turn when it is in position. When a pallet is in the open position it creates two openings along its axis, one of which is large enough for a truck to pass through. There is an entrance into the cooler located just above the pallet conveyor floor in the vicinity of the bin storage bin.

On September 10, 1981, during a regular inspection of the preparation plant, an inspector of the Department of Labor's Mine Safety Health Administration ("MSHA") observed a maintenance foreman, who was not wearing a safety line, climbing out of a cooler after performing repair. While exiting, the foreman was in the immediate vicinity of an opening to the storage bin. The cooler was not operating at the time. During the repair work, a pallet was in the upright position over the storage bin. Plywood panels had been placed over the openings created by the raised pallet. Before climbing out of the cooler, the foreman handed up the plywood panels.

After investigating the situation, the inspector concluded that there was a danger of falling 18 feet to the storage bin through the large opening created by the raised pallet, and that the foreman's failure to wear a safety line was in violation of 30 C.F.R. § 55.15. The inspector also found that the violation was significant and substantial and caused by the operator's "unwarrantable failure" to comply with the standard, and he cited the violation in a withdrawal order issued pursuant to section 104(d)(2) of the Mine Act. 30 U.S.C. § 814(d)(2). 2/

2/ Section 104(d) of the Mine Act provides:

(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature that it could significantly and substantially contribute to the cause or effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue a withdrawal order requiring the operator to cause all persons in the area affected by such violation ... to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection of the

U.S. Steel filed a notice of contest of the order, and the Secretary of Labor filed a petition for the assessment of a civil penalty. At the consolidated hearing before the Commission's administrative law judge, U.S. Steel argued that the standard was too vague to be enforced. In his decision the judge disagreed. He concluded that the standard's phrase, "danger of falling," did not extend to de minimis situations, i.e., possible falls of only a few inches or feet, and was sufficient to apprise "reasonably prudent operators" when safety belts are to be worn. 4 FMSHRC at 1109. Finding that an "ordinary working person" would have recognized a danger of falling through the large opening created by the raised pallet in the cooler, the judge concluded that, on the facts present in the case, the foreman's exit from the cooler amounted to a violation of section 55.15-5. 4 FMSHRC at 1109-10.

The judge also concluded that the inspector had issued a valid withdrawal order under section 104(d)(2) of the Mine Act. The judge held that to sustain a section 104(d)(2) withdrawal order, the Secretary of Labor has the burden of proving the absence of an intervening clean inspection of the entire mine and that the violation was caused by an unwarrantable failure to comply with a mandatory standard. The judge relied on CF&I Steel Corporation, 2 FMSHRC 3459 (December 1980), in which we approved an identical allocation of evidentiary burdens under the analogous provisions of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) (amended 1977). Although acknowledging that the evidence was "skimpy" and "possibly conflicting," the judge held that the Secretary had made out a prima facie case establishing the absence of an intervening clean inspection. 4 FMSHRC at 1107-09.

Finally, relying on the definition of unwarrantable failure announced under the 1969 Coal Act by the Department of the Interior's Board of Mine Operations Appeals in Zeigler Coal Company, 7 IBMA 280 (1977), the judge held that the violation was unwarrantable because it was committed by a foreman, a representative of management, who "should have known of the hazard and should have taken steps to avoid it." 4 FMSHRC at 1110.

We turn first to U.S. Steel's challenge that the standard is too vague to be enforced. The standard's requirement that safety belts and lines shall be worn by miners where there is a danger of falling is the kind of regulatory mandate "made simple and brief in order to be broadly adaptable to myriad circumstances." Kerr-McGee Corp., 3 FMSHRC 2496, 2497 (November 1981). We have held previously that application of such a broad standard to particular factual contexts does not offend due process if the operator's allegedly violative conduct is judged with reference to the objective test of what actions would have been taken under the same circumstances by a reasonably prudent person familiar

identical personal protection standard dealing with safety lines contained at 30 C.F.R. § 57.15-5. Great Western Electric Company, 5 FMSHRC 840, 841-42 (May 1983). U.S. Steel has presented no arguments that would lead us to reconsider that holding. The judge's application of the standard in this case, while differing in some minor respects from the Great Western formulation, was sufficiently similar to our approach in that case to pass muster on review. We therefore reject U.S. Steel's vagueness challenge.

U.S. Steel's petition for discretionary review frames the issue with respect to the judge's conclusion of a violation only in terms of a generalized vagueness challenge. Nevertheless, the operator's brief contains some discussion that can be read as a challenge to the judge's specific findings that U.S. Steel violated the standard. We must emphasize the procedural bar against a party attempting in its brief to enlarge upon the issues raised in its petition for discretionary review. See 30 U.S.C. § 823(d)(2)(A)(iii)&(B); Commission Procedural Rules 70(f) & 71, 29 C.F.R. §§ 2700.70(f) & 71. We wish to make clear, however, that the judge's findings are supported by substantial evidence.

There was no dispute that the foreman, when climbing out of the cooler, did not wear a safety belt. The judge evaluated the foreman's testimony describing his exit from the cooler, and concluded that a danger of falling should have been recognized under the circumstances. 4 FMSHRC at 1109-10. The exit from the cooler was at least four feet above the pallet conveyor floor. The foreman testified that he pulled himself out by grabbing a gate bar located at the exit while bracing his knee against the cooler wall for balance. As noted above, the foreman had already handed up the plywood panels used to cover the openings over the storage bin and his exit was performed in the immediate vicinity of the openings. An 18-foot drop would have occurred if the foreman had fallen through the large opening over the storage bin. We conclude that substantial evidence, evaluated in the light of our Great Western Electric test, supports the judge's conclusion that U.S. Steel violated the standard.

We next examine the judge's findings concerning the validity of the section 104(d)(2) withdrawal order. The plain language of section 104(d)(2) of the Mine Act (n. 2 supra) establishes three general prerequisites for the issuance of an initial section 104(d)(2) withdrawal order: (1) a valid underlying section 104(d)(1) withdrawal order; (2) a violation of a mandatory safety or health standard "similar to [the violation] that resulted in the issuance of the withdrawal order under [section 104(d)(1)];" and (3) the absence of an intervening "inspection of such mine disclos[ing] no similar violations."

Our resolution of the issue raised in this case turns on the third element -- the intervening clean inspection. Recently, we reaffirmed the rationale of CF&I, supra, and extended the prior consistent interpretation of "clean inspection" under the 1969 Coal Act to the 1977 Mine Act. Kitt Energy Corp., 6 FMSHRC 1596, 1598-1601 (July 1984), petition for review filed sub nom. United Mine Workers of America v. FMSHRC, No. 84-1428 (D.C. Cir. August 17, 1984). We held in Kitt Energy that to establish the validity of a section 104(d)(2) withdrawal order under the 1977 Mine Act, the Secretary of Labor must prove the absence of an intervening clean inspection of the entire mine. We further held that such an intervening clean inspection is not limited solely to a complete regularly scheduled inspection, but may be composed of a combination of inspections, so long as taken together they constitute an inspection of the mine in its entirety. Thus, the judge appropriately relied on CF&I in addressing the clean inspection issue raised here. We conclude, however, that substantial evidence does not support the judge's factual finding that the Secretary established the absence of an intervening clean inspection. The entire testimony on the issue is limited and we quote it in full.

Initially, on direct examination the inspector testified:

- Q. [By counsel for the Secretary] Now, when you decided to issue your particular 104(d)[(2)] ... order, were you aware that there was a prior 104(d)(1) order in effect at the Minntac plant?
- A. Yes, I issued it.
- Q. You said you were the inspector who issued the prior 104(d)(1) order?
- A. I was.
- Q. Could you tell us what standard was cited in the prior 104(d)(1) order?
- A. That was also a 15-5 safety belt standard.
- Q. Now, when you decided to issue the--the 104(d)(2) order, did you know whether there was a prior intervening clean inspection that had taken place since your issuance of the 104(d)(1) order?

Q. And how do you know that?

A. Cuz I was the inspector. I issued the last one.

Tr. 27-28 (emphasis added).

In response to questions on cross-examination, the inspector testified:

Q. [By counsel for U.S. Steel] Okay. Now did you inspect Minntac operations between March 3rd, 1981 -- March 31, 1981 and September 10th, 1981?

A. Oh, sure.

Q. Were you there everyday?

A. No, not every day.

Q. Were you there regularly?

A. Just about.

Q. And did you cover the entire facility?

A. Um, I have covered the entire facility, yes.

Q. The entire Minntac plant?

A. The entire I.D. No. 820, yes. [I.D. No. 820 refers to the Minntac plant.]

Q. So between March 3rd, 1981 -- March 31, 1981, and September 10, 1981, you had been entirely through the Minntac Plant?

A. Are you talking about a complete thorough inspection?

Q. I'm asking you if you went to every area in the Minntac Plant between March 31st, 1981, and September 10th, 1981.

A. This was a different inspection on -- in March.

acknowledged the "skimpy and possibly conflicting" nature of the testimony. The judge provided no analysis of this evidence and concluded, "[B]ased on the above testimony, ... MSHA established prima facie that there was not an intervening clean inspection between the section [104](d)(1) and (d)(2) orders. U.S. Steel did not offer any evidence to rebut the prima facie showing." 4 FMSHRC at 1109. We respectfully disagree.

During direct examination, the inspector appeared to give clear testimony that "There was not no clean inspection, no." Tr. 28. Presumably, however, the inspector's view of what constitutes a clean inspection agrees with that argued by the Secretary: that only a regular quarterly inspection without similar violations lifts the section 104(d) chain. Our presumption is strengthened by the inspector's testimony on cross-examination, when he tried to distinguish regular inspections he had conducted between March 31 and September 10, 1981. As noted above, we have held that any combination of regular or other inspections that covers the entire mine can constitute an intervening clean inspection. The inspector testified that he was at the Minntac Mine regularly and that between March 31 and September 10, 1981, "I have covered the entire facility, yes. ... The entire I.D. No. 820, yes." Tr. 53-54. The inspector's final word on the subject only compounded the confusion between his initial testimony and his later testimony: "Well, that's possible I went through there." Tr. 54.

Precisely the same kind of concession of a "possible" intervening clean inspection composed of a series of spot inspections covering the entire mine led the Commission in CF&I to conclude that a prima facie case of the absence of an intervening clean inspection had not been established. 2 FMSHRC at 3460-61. We also are mindful that the judge himself characterized the inspector's testimony in this proceeding as "skimpy" and "possibly conflicting." Our responsibility on review is to examine the entire record, and the totality of the inspector's testimony on direct examination and cross-examination is entirely too vague and uncertain to establish a prima facie case of the absence of an intervening clean inspection. We cannot treat this contradictory evidence as affording substantial evidentiary support to the judge's finding that there was an absence of an intervening clean inspection. Accordingly, because a prerequisite to issuance of a valid section 104(d)(2) withdrawal order is lacking, we vacate the order.

however, allegations of violation and any section 104(d) special findings associated with the violation survive the vacation of order which they are contained. Consolidation Coal Co., 4 FMSHRC 1791, 97 (October 1982); Island Creek Coal Co., 2 FMSHRC 279, 280 (February 1980). In Consolidation Coal, supra, we vacated a procedurally defective section 104(d)(1) withdrawal order that contained special findings that the violation was significant and substantial and caused by an unwarrantable failure to comply. We held that an absolute vacation of the order and dismissal would allow a serious violation to fall outside the statutory sanction expressly designed for it--the section 104(d) sanction of citations and orders. 4 FMSHRC at 1793-94. Thus, under the circumstances present in that case, we affirmed the judge's modification of the defective order to a section 104(d)(1) citation. 4 FMSHRC at 97. In a related vein, we have also held recently that special findings may be included in a citation issued pursuant to section 104(a) of the Mine Act. Consolidation Coal Co., 6 FMSHRC 189, 191-92 (February 1982).

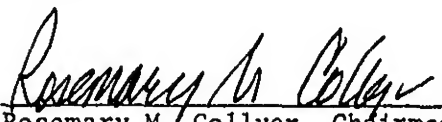
In this case, the inspector cited the violation as being significant and substantial and caused by an unwarrantable failure to comply. The requisite special findings therefore are present to support a possible modification of the section 104(d)(2) order to the appropriate section 104(d)(1) order or citation. Because the section 104(d)(2) order stands, we remand to the judge to determine the appropriate modification.

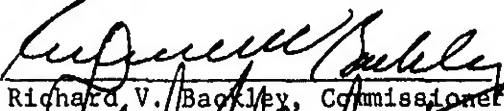
The final issue in this case is whether the judge erred in concluding that the violation was caused by the unwarrantable failure of the operator to comply with the standard. As just noted, this finding bears on the appropriate modification. The judge summarily concluded, "The violation was committed by a foreman, a representative of management. He should have known of the hazard and should have taken steps to avoid it." 4 FMSHRC at 1110. U.S. Steel contends that the judge

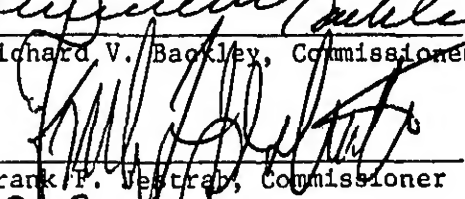
3/ We note that for a section 104(d)(1) withdrawal order to issue validly, the violation must have been caused by an unwarrantable failure to comply with the standard, and the order must have been issued within the same inspection or any subsequent inspection within 90 days after the issuance of the original 104(d)(1) citation. If this violation occurs within the 90-day limit, then it may be cited within a section 104(d)(1) order if it also occurred as a result of the unwarrantable failure of the operator to comply with the standard--the final issue discussed below in this decision. If, however, the violation occurs outside the 90-day period, the invalid order could still possibly be modified to a section 104(d)(1) citation if the violation was both significant and substantial and unwarrantable. (If the judge needs to decide whether the violation here was significant and substantial, we shall afford the parties the opportunity to submit additional argument on the subject, if they desire.) If on remand, the judge determines

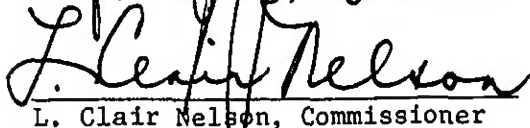
representative of management his violative conduct constituted an unwarrantable failure to comply. We find the judge's conclusion on this issue to be insufficiently explained. Consequently, we are unable to exercise meaningful review as to whether the conclusion is legally proper and supported by substantial evidence. See The Anaconda Company, 3 FMSHRC 299, 299-302 (February 1981). Accordingly, we remand this question to the judge. In the interests of procedural fairness, the judge should allow the parties to reargue their positions concerning unwarrantability, if they desire. After considering any such argument, the judge should articulate fully the reasons for his ruling on this issue.

Accordingly, we affirm the judge's conclusion that U.S. Steel violated section 55.15-5. Because we reverse his finding concerning the absence of an intervening clean inspection, we vacate the section 104(d)(2) withdrawal order and remand for proper modification of the order as discussed above. We also remand for reconsideration of the issue of unwarrantable failure and, if necessary, the question of whether the violation was significant and substantial (see n. 3, supra). 4/


Rosemary M. Collyer, Chairman


Richard V. Backley, Commissioner


Frank P. Vestrah, Commissioner


L. Clair Nelson, Commissioner

4/ The Secretary also argues that U.S. Steel violated Commission Procedural Rules 20(c) and 28, 29 C.F.R. §§ 2700.20(c) & .28, by not specifically pleading its reliance on the issue of the intervening clean inspection, and that the judge erred in excusing that failure. The issue of the absence of an intervening clean inspection was part of the Secretary's prima facie case. The Secretary was required to prove all those elements of the prima facie case that had not been admitted or waived. In this instance, U.S. Steel generally denied "all other

The judge's conclusion that U. S. Steel violated section 55 clearly correct, supported by substantial evidence, and was challenged by this operator only in terms of a generalized vagueness asserted by the majority acknowledges. My colleagues, however, have chosen to ignore the substantial evidence found by the judge below to have established that MSHA did not carry out a complete (clean) inspection of this mine during the applicable period. Finding of Fact 7; Conclusion of Law 3.

The decision below has been found wanting by the majority because the judge "summarily concluded" that this violation was caused by an unwarrantable failure of the operator to comply with the standard. His conclusion was "insufficiently explained." As they note, "we were unable to exercise meaningful review as to whether the conclusion was legally proper and supported by substantial evidence ... Accordingly, we remand this question to the judge." Slip op. at 9 (citation omitted).

However, a different standard of review is applied to the "clean inspection" question. The majority here, too, finds that "the judge provided no analysis of this [intervening clean inspection] evidence." Slip op. at 7. Although I would not disagree that the judge's reasoning would be significantly more satisfactory had it included an explicit explanation for its bases, I am not prepared so readily to overturn his clear holding that MSHA "established prima facie that there was an intervening clean inspection," 4 FMSHRC at 1109, and, as the majority acknowledges, "U.S. Steel did not offer any evidence to rebut the prima facie showing." Id.

As the judge acknowledged, the testimony below was "skimpy" and "possibly conflicting." The judge, performing his fact-finding function, resolved that conflict. His reasons may have included an evaluation of the witness' demeanor, evidence that MSHA inspector Wasley had a presence at this mine, and, of most significance, his clear testimony that: "There was not no clean inspection, no." Slip op. at 5, 28. 1/ (Emphasis added). The Commission should be loath to overturn the judge's determination and substitute a differing view of the facts in the absence of any rationale other than disagreement with the fact-finding and resolution of the conflicting evidence and speculation regarding its meaning (see note 1, supra).

My colleagues' failure to remand this issue for necessary clarification is thus internally inconsistent. In lieu of affirmation by the judge on this issue, which would appear to me supportable on this record, I would remand for clarification on this issue as well. See The United States Steel Company, 3 FMSHRC 299 (1981). Whatever may transpire in the future, this case will be better accomplished with such judicial clarification.

Distribution

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Administrative Law Judge James Broderick
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ADMINISTRATIVE LAW JUDGE DECISIONS

DECISION

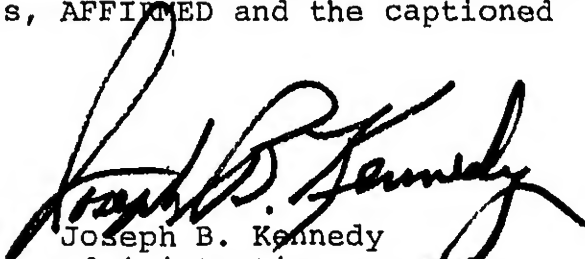
Appearances: Rafael Alvarez, Esq., Office of the Solicitor,
U.S. Department of Labor, Chicago, Illinois,
for Petitioner;
Barbara Reeves, Eureka Mining Corporation,
Morgantown, Kentucky, for Respondent.

Before: Judge Kennedy

This matter came on for an evidentiary hearing in Owensboro, Kentucky on Thursday, July 26, 1984. At the conclusion of the hearing the parties conferred and moved for approval of a settlement of the two violations charged in the amount of \$50.

Based on an independent evaluation and de novo review of the circumstances as set forth in the transcript of the hearing, I found the settlement proposed was in accord with the purposes and policy of the Act.

Accordingly, it is ORDERED that the decision approving settlement be, and hereby is, AFFIRMED and the captioned matter DISMISSED.


Joseph B. Kennedy
Administrative Law Judge

Distribution:

Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, 230 South Dearborn St., 8th Fl., Chicago, IL 60604 (Certified Mail)

Ms. Barbara Reeves, Eureka Mining Corporation, P.O. Box 277, Morgantown, KY 42261 (Certified Mail)

/ejp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

August 3, 1984

UNITED MINE WORKERS OF	:	DISCRIMINATION PROCEEDINGS
AMERICA (UMWA),	:	
ON BEHALF OF	:	Docket No. KENT 82-10
JERRY D. MOORE,	:	MADI CD 82-05
	:	
LARRY D. KESSINGER,	:	Docket No. KENT 82-10
	:	MADI CD 82-04
Complainants	:	
v.	:	Eastern Division Operations
	:	
PEABODY COAL COMPANY,	:	
Respondents	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
ON BEHALF OF	:	
THOMAS L. WILLIAMS,	:	Docket No. LAKE 83-69
Complainant	:	VINC CD 83-04
v.	:	
	:	Eastern Division Operations
PEABODY COAL COMPANY,	:	
Respondent	:	

ORDER AWARDING DAMAGES
ORDER AWARDING ATTORNEYS FEES
ORDER ASSESSING CIVIL PENALTIES

Appearances: Mary Lu Jordan, Esq., United Mine Workers America, Washington, D.C. on behalf of Complainants Jerry D. Moore and Larry D. Kessinger;
Frederick W. Moncrief, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, on behalf of Complainant, Thomas L. Williams;
Michael O. McKown, Esq., Peabody Coal Company, St. Louis, Missouri, for Respondent.

The operator and the Solicitor have stipulated that the total back pay and interest through July 23, 1984, to which Complainant, Thomas L. Williams, is entitled under the July 11 decision is \$29,301.61.

In addition, the Solicitor seeks recovery of unreimbursed medical expenses, the amount of which the parties agree is \$710. Reimbursement is also sought for the cost of obtaining recertification as an electrician. The parties agree that Complainant worked in the mines as an electrician before his lay off (Hearing, July 27, 1984, p. 6-7). The operator concedes that under the July 11 decision Complainant is entitled to medical expenses and recertification (Hearing July 27, 1984, p. 5, 7-8).

Complainant further seeks money damages for losses he incurred in real estate and business ventures after he was laid off. By letter to the Solicitor dated May 5, 1984, Complainant's private attorney, Mr. Clyde Collins, alleges realty losses of \$58,380. Mr. Collins' letter sets forth the following: In June 1982 Complainant purchased a residential property and a rental property for \$58,000 (\$20,000 for residential and \$38,000 for rental); the purchase was financed through a first mortgage to The Peoples National Bank, New Lexington, Ohio, of \$50,000 and a second mortgage to the sellers of \$8,000; Complainant was unable to make the mortgage payments in the first half of 1983 and the bank foreclosed on the mortgages, which foreclosure became final January 13, 1984; both properties were sold at a Sheriff's sale from which deficiency judgments against Complainant total \$41,380; the properties were worth \$75,000 and Complainant's loss of equity is \$17,000; the combined damages from the deficiency judgments and the equity loss are \$58,380.

The Solicitor and operator's counsel agree that with additional interest through July 23, 1984, the claimed realty loss as of this date is \$62,018.36 (Stipulation No. 6).

In addition, Complainant claims money damages arising from business losses. In this respect the attorney's letter sets forth the following: In December 1982, Complainant leased the real estate and equipment of a restaurant business for six months; Complainant borrowed \$2,500 from the City Loan in New Lexington to be used as capital in connection with the restaurant; during the first four months of

restaurant; the owners of the restaurant were also in fault on the mortgage held by the bank on the restaurant property; in April 1983, Complainant reached an agreement with the owners of the restaurant for a new three year lease, but the bank refused to consent to the lease due to arrearages already existing on Complainant's residential mortgages with the bank; Complainant attempted a Chapter 11 bankruptcy, but a feasible plan could not be worked out since the liabilities had reached the point where the necessary payment into the plan was beyond Complainant's ability. Complainant returned possession of the restaurant premises to the owners at the conclusion of the initial lease; the financial loss from this venture was \$12,809.16.

Finally, the attorney's letter states that Complainant incurred attorneys fees arising out of the matters described above in the amount of \$7,235 and job hunting expenses of \$1418.64.

Section 105(c)(2) of the Act, pursuant to which the Solicitor filed this action on Complainant's behalf, provides as follows with respect to the relief that can be given:

* * * The Commission shall afford an opportunity for a hearing; (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying or vacating the Secretary's proposed order directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. * * * [Emphasis supplied.]

The Senate Report states with respect to relief under section 105 cases as follows:

It is the Committee's intention that the Secretary propose, and the Commission require, all relief necessary to make the complaining party whole and

remove the deleterious effects of the discriminatory conduct including, but not limited to reinstatement with full seniority rights, back-pay with interest, and recompense for any special damages sustained as a result of the discrimination. The specified relief is only illustrative.

S. REP. NO. 95-181, 95th Cong., 1st Sess. 37 (1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, 95th Cong., 2d Sess., at 625 (1978).

The Act specifically provides for back pay and interest. Accordingly, the Complainant is entitled to \$29,301.61 plus additional interest from July 23, 1984 to the date of payment computed in accordance with applicable Commission precedent.

In addition, it must be determined whether the additional special damages which Complainant seeks may be awarded as "other appropriate relief" under section 105 (c)(2), supra. In the words of the Senate Report quoted, supra, such damages are awarded when they are sustained "as a result of" the discrimination. The right to recover such amounts under the Mine Act has not been decided. Reference may be made, however, to general principles of law. It has been held that in order to be recoverable, damages must be proved to be the proximate result of the complained wrong. Classic Bowl, Inc. v. AMF Pinspotter, Inc., 403 F.2d 463 (7th Cir. 1968). The legal concept of proximity is applicable to ascertain and measure damages. The necessary and appropriate limits of judicial inquiry are served by disregarding consequential and remote effects. Commonwealth Edison Company v. Allis-Chalmers Manufacturing Company, 225 F. Supp. 332 (N.D. Ill. 1963). The usual monetary measure of damages for wrongful discharge at common law, under the National Labor Relations Act and under the Equal Opportunity Act is back pay less interim earnings. St. Clair v. Local Union 515, 422 F.2d 128 (6th Cir. 1969). An employee discharged in violation of the Railway Labor Act was held entitled in addition to reinstatement only to an award of back pay. Brady v. Trans-World Airlines, Inc., 244 F. Supp.

16.5% interest rate (Hearing July 27, 1984, p. 13). Even where the individual did not engage in such activities, recovery for his loss of a home to the mortgage holder has been denied. St. Clair v. Local Union No. 515, supra. Moreover, just a few months after Complainant undertook the sizeable real estate debts just described and after he had been laid off, he went into the restaurant business, again without any equity of his own and borrowing additional cash from a loan company and obligating himself to monthly payments of \$1500 under a six months lease. It is little wonder that the bank which held the mortgages on Complainant's realty and the mortgage on the restaurant refused to consent to a new lease on the restaurant. It must also be noted that it appears from the attorney's letter that the owners of the restaurant had no other assets because they immediately went into default when Complainant could not pay them. In sum therefore, many intervening factors, and not the wrongful layoff, are responsible for Complainant's damages in real estate and business. The principal and precipitating factor in Complainant's financial debacle has been his own business and financial judgment, or lack thereof. Under such circumstances, award of special damages would not be appropriate under the Act and such relief is denied.

The same considerations apply with respect to the attorney's fees and related expenses which were incurred by Complainant as a result of his real estate and business activities. Recovery of damages for these items is also denied.

1/ None of the real estate and business figures given by Complainant's private attorney have been verified. Many appear highly questionable. For example, the value of the real estate is given as \$75,000 although Complainant paid only \$58,000 for it with no down payment. At the foreclosure sale, the properties were sold for \$26,666 which, according to the Order of Sale furnished by the Solicitor, was at least 2/3 of the appraised value. Accordingly, the appraisal value could not have been more than \$40,000. For the reasons set forth herein, it is not necessary for present purposes to determine the true extent of Complainant's losses in these matters.

As set forth above, the letter from Complainant's attorney alleged expenses of \$1,418.64 related to seeking employment. The Solicitor's brief cited no case law to support an award of such damages. The Solicitor advised that he knew of no precedent to support such an award and indeed stated that decisions under the National Labor Relations Act indicated such an award would not be made (Hearing July 27, 1984, p. 16). The claim of damages for these amounts is, therefore, denied.

Two other items remain for consideration. As previously stated, the parties agree that the unreimbursed medical expenses are \$710. Operator's counsel advised that no objection exists with respect to this item (Hearing July 27, 1984, p.5). So too, the operator does not object to payment for the Complainant's recertification as an electrician (Hearing July 27, 1984, p. 7-8). It should be noted that an award of damages in these two instances would be appropriate under the principles set forth herein. The medical expenses would have been paid for by health insurance if Complainant had been working and the electrical certification would not have expired if Complainant had not been laid off. The layoff was the proximate cause of these particular losses.

Finally, careful consideration has been given to the decision in Secretary of Labor on behalf of Noland v. Luck Quarries, Inc., 2 FMSHRC 954 (1980). In that case, recovery was allowed under section 105(c)(2) for lost equity in a truck. The miner there had been a truck driver who hauled rock in his own truck for the company which had wrongfully discharged him. Because of earnings lost due to the discharge, the Complainant lost the truck. In order for the miner in Noland to return to his former work hauling rock, he needed a truck. It was therefore not enough in that case to order reinstatement with back pay and interest. The analogous item in the instant case is the cost of recertification as an electrician which has been allowed and which would permit Complainant to resume his former position in the mines as an electrician. The decision in Noland is not precedent for an award in this case of special damages arising from real estate and business losses unrelated to Complainant's ability to return to his former position and caused by many factors other than the discriminatory layoff.

The operator and the United Mine Workers have a that under the July 11 decision, total back pay and through July 23, 1984, payable to Mr. Kessinger is \$ and to Mr. Moore is \$59,294.25.

Section 105(c)(3) of the Act, pursuant to which union brought these actions on behalf of Complainant singer and Moore, provides for relief in terms like section 105(c)(2) already considered with respect to suit brought by the Solicitor. Section 105(c)(3) pr in pertinent part as follows:

* * * The Commission shall afford an opportunity hearing (in accordance with section 554 of title United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as the Commission deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance. Whenever an order is issued sustaining the Complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation.
* * * [Emphasis supplied.]

Since the Act specifically provides for back pay and interest, Complainant Moore is entitled to \$59,294.42 plus interest after July 23, 1984, and Complainant Kessinger is entitled to \$43,320.12 plus interest after July 23, 1984. Interest is computed in accordance with applicable Commission precedent.

These cases present the additional issue of attorney's fees. Counsel for the union has filed a petition for attorney's fees detailing 127.75 hours spent on these

\$100 per hour. The total fee sought is \$12,628.50. 2/ The operator did not object to the number of hours claimed or to the market rate given by the union (Hearing July 27, 1984, p. 4).

It has been decided that attorneys fees may be awarded in discrimination cases brought under the Mine Safety Act by the union on behalf of miners. In Munsey v. Federal Mine Health and Safety Review Commission, 701 F.2d 976 (D.C. Cir. 1983), the Court of Appeals for the District of Columbia held in this respect as follows:

* * * This circuit has recognized that unions and union attorneys are entitled to costs and attorney fees for representation of union members. Nat'l Treasury Employees Union v. U.S. Dep't of the Treasury, 656 F.2d 848 (D.C. Cir. 1981). If attorney fees are awarded to the union itself rather than its attorney, the union can only recoup the expenses it incurred in supplying services to the client; above-cost fees to the union itself would be inappropriate. Id. at 853. If attorney fees are awarded to the attorney alone (and not for the union's general treasury), the attorney is entitled to receive the market value of the services rendered. The mere fact that an attorney is a salaried employee of the union should not affect the size of the fee to which he is entitled. Id. at 850. "Reasonableness, in terms of market value of the services rendered, is the sole limit on fee awards to organizationally-hired lawyers when the fees are to be paid to the lawyers alone." Id. at 852-853.

On remand, the Commission should determine the amount to be awarded in accordance with the standards set forth in Nat'l Treasury Employees Union v. U.S. Dep't of the Treasury, supra. 1/

1/ We note that in past cases we have required salaried attorneys recovering the market value of their services from defendants to reimburse their employers for the kinds of expenses the employers incurred that would normally be included in an attorney's fee, including the salaries of the lawyers and their adjunct staff. * * *

The hours and market rate claimed are reasonable in light of the nature of the cases and all that has happened in them. Accordingly, a total fee of \$12,628.50 is accepted. The representation that the union's cost is \$60 per hour is also accepted. Accordingly, \$7,678.50 of the total fee is awarded to the union and the balance of \$4,950 is awarded to the union's counsel.

The statutory scheme of health and safety in the coal mines expressed in the Mine Safety Act provides through meaningful participation by miner representatives. In bringing these actions, the union has fulfilled its role and demonstrated the value of the opportunity to participate.

Assessment of Civil Penalties

The Solicitor has filed a petition seeking the assessment of a civil penalty of \$1000 in each of the three cases. The parties agreed with respect to the six criteria set forth in section 110(i) of the Act (Hearing July 27, 1984, p. 25-27). The operator waived its right to file a petition and had no objection to payment of these amounts (Hearing July 27, 1984, p. 24). The proposed penalties are consistent with the Act and will advance its purposes. Accordingly, civil penalties totalling \$3,000 are assessed.

Order

It is Ordered that the operator pay Complainant Thomas L. Williams \$29,301.61 and \$710 plus interest from July 27, 1984, to the date of payment.

It is further Ordered that when Complainant Thomas L. Williams is recalled, the operator either pay necessary reasonable costs of electrical recertification or provide the instruction necessary for such recertification.

It is further Ordered that all other claims of Complainant Thomas L. Williams for damages are Denied.

It is further Ordered that the operator pay Complainant Jerry D. Moore \$59,294.45 plus interest from July 27, 1984, to the date of payment.

It is further Ordered that the operator pay attorneys of \$7,678.50 to the United Mine Workers of America.

It is further Ordered that the operator pay attorneys of \$4,950 to Ms. Mary Lu Jordan, Esq.

It is Ordered the operator pay civil penalties of \$100. If no appeal is taken, payment of civil penalties shall be made within 30 days of the expiration of the appeal period.

A handwritten signature in black ink, reading "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and "M".

Paul Merlin
Chief Administrative Law Judge

Distribution:

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(Certified Mail)

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Street, N.W., Washington, DC 20005 (Certified Mail)

Derrick Moncrief, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

August 3, 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY P
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST
Petitioner	:	A.C. No. 02-001
v.	:	
	:	Docket No. WEST
PHELPS DODGE CORPORATION,	:	A.C. No. 02-008
Respondent	:	
	:	New Cornelia Br

DECISION

Appearances: John C. Nangle, Esq., Associate Reg
Solicitor, U.S. Department of Labor
Angeles, California, for Petitioner
Stephen W. Pogson, Esq., Evans, Kit
Jenckes, P.C., Phoenix, Arizona, fo
dent.

Before: Judge Merlin

These cases are petitions for the assessment
penalties filed by the Secretary of Labor against
Dodge Corporation. The hearing was held as schedu
May 30, 1984.

By agreement of the parties, these cases were
dated for hearing and decision (Tr. 5). At the he
parties agreed to the following stipulations (Tr.

1. The operator is the owner and operator of
subject mine.
2. The operator and the mine are subject to
diction of the Federal Mine Safety and Health
1977.
3. The administrative law judge has jurisdic
4. The inspectors who issued the subject cit
were duly authorized representatives of the s
barr

6. Copies of the subject citations and terminations are authentic and may be admitted into evidence for the purpose of establishing their issuance but not for the purpose of establishing the truth or relevancy of any statement asserted therein.

7. Imposition of penalties herein will not affect the operator's ability to continue in business.

8. All the alleged violations were abated in good faith.

9. The operator's previous history of violations is average. 1/

10. The operator's size is large.

11. Violations occurred in citations Nos. 2086972 and 2086671.

Citation No. 2086972

Section 55.14-1 of the mandatory standards, 30 C.F.R. § 55.14-1, provides as follows:

Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded.

The citation describes the condition or practice as follows:

There was no guard to prevent a person from contacting the auxilliary (sic) rope starter on the 10 h.p. gasoline engine for the air compressor located on the bed of M-41 GMC service truck. The rope starter was about 5 feet above the ground and faced out from the truck bed. It was in motion when the motor was running and was next to the electric starter switch.

As set forth in stipulation No. 11, supra,
tion is admitted. The inspector explained that the
starter in question was an auxiliary to the auto
starter, primarily used to start up the air compressor
pumped air into tires (Tr. 8, 26). The inspector
testified that the air compressor mounted on a trailer
used on uneven ground or on ground covered with loose
(Tr. 27-28). I accept this testimony over contra
mony from the operator's safety supervisor (Tr. 30). I
further accept the inspector's testimony that an operator
could slip and lose his footing thereby coming in contact
with the moving part of the machine. An injury was
(Tr. 28, 30). Accordingly, I conclude the violation was
serious. I reject the argument that because the operators
operating the starter were familiar with it, an accident
not happen (Tr. 45). The history of mining is replete with
knowledgeable people becoming involved in serious accidents
either through their own misconduct or through events
which they had no control. The starter should not have been
left uncovered. The operator was guilty of ordinary negli
gence.

Finally, I believe the violation was significant and
substantial. The operator of the air compressor and other
others whose equipment was being serviced are routinely in
the area and could stumble on the uneven ground and be
caught. Any injury would be severe. The reasonable proba
hood tests of the Commission are satisfied. U.S. Coal
Corp., --- FMSHRC --- (July 11, 1984), Consolidated
Company, 6 FMSHRC 34 (1984), Consolidation Coal Co.,
FMSHRC 189 (1984).

A penalty of \$75 is imposed.

Citation No. 2086667

Section 55.11-1 of the mandatory standard, 30 C.F.R.
§ 55.11-1, provides as follows:

Safe means of access shall be provided and maintained to all working places.

The citation describes the condition or practice as follows:

An employee was observed crossing the No. 1 primary pan feeder dump to and from

was not provided, due to the opening on both sides of the track, use [sic] for dumping ore cars. This was not a regular travel area, company had an access on east side of the ore dump.

The operator concedes that under Commission precedent trestle was a means of access and that it was required to be safe. Hanna Mining Company, 3 FMSHRC 2045 (1981). The operator argues, however, that MSHA failed to show that trestle was not safe. This argument cannot be accepted. Trestle was eight feet wide with five feet between the rails. It was approximately 50 feet long. The trestle spanned a chasm, 14 to 15 feet deep, which was the dumping point. Trains moved along the rails and dumped onto a pan feeder. There was a danger of falling into the pan feeder and an individual were to trip (Tr. 81). The locomotive engineer and the dump operator, who brought the materials to the trestle to be dumped, were required by the operator to rope themselves off. They were to place a lanyard in a way that if they fell, they would be caught and prevented from falling into the chasm (Tr. 86). Thus, the operator itself recognized the danger of being on the trestle.

Based upon the foregoing, I conclude a violation existed and that it was serious. I further determine that the operator was negligent in not preventing use of the unsafe trestle by the workers. Finally, the violation was significant and substantial. It was reasonably likely that use of trestle would result in a reasonably serious injury. Steel, --- FMSHRC --- (July 11, 1984), Consolidation Company, 6 FMSHRC 34 (1984).

A penalty of \$125 is assessed.

Citation No. 2086671

Section 55.9-7 of the mandatory standards, 30 C.F.R. 55.9-7, provides as follows:

Unguarded conveyors with walkways shall be equipped with emergency stop devices or cords along their full length.

The citation describes the condition or practice as follows:

to about three (3) foot wide walkway, an emergency stop cord was mounted up front from the idle roller to where a person could not reach it if he or she had needed it in an emergency. Exposure would be about one person, one time on daily basis.

As set forth in Stipulation No. 11, supra, the violation in this instance was admitted. The evidence demonstrates that the stop cord was missing for a relative short distance running from the angle iron back to the pulley ("C" to "D", MSHA Exh. No. 11) (Tr. 119-121). The inspector and the operator's safety inspector were in conflict over whether an individual would be seriously injured if they became caught at a pinch point where there was no emergency cord (Tr. 124-125, 135-140, 154). I find the inspector's testimony more persuasive in this regard and accept it. Maintenance personnel and repairmen were working in the area in the performance of their usual duties and the conveyor could be running although this would be rare (Tr. 145-150). The violation was serious. I accept the inspector's evaluation that negligence was low (Tr. 124). The violation was significant and substantial because it was reasonable to expect that an individual who became caught would suffer a reasonably serious injury.

A penalty of \$70 is assessed.

Citation No. 2086672

Section 55.11-1 of the mandatory standard 30 C.F.R. § 55.11-1, provides as follows:

Safe means of access shall be provided and maintained to all working places.

The citation described the condition or practice as follows:

The entire length (sic), and both sides of No. 2 conveyor had accumulations of muck with rocks up to about 8 (eight) inches in diameter in the walkways, also piles of muck up to about (three) 3 feet high. Possible tripping and/or fall hazard.

The inspector's description in the citation of

on the walkway but argues nevertheless that it was a safe means of access (Operator's Brief P. 7). The inspector testified that the risk was of someone tripping and falling (Tr. 115). I find the inspector's testimony persuasive and accept it. The operator's witness first indicated that maintenance people, when making their rounds, merely shine a flashlight down the walkway rather than traveling down it (Tr. 131-132, 150-151, 152) but later he admitted that sometimes they might travel down the walkway to check it (Tr. 151, 153). I find that maintenance and repair personnel were required to travel along the walkway in performance of their regular duties. A violation existed and it was serious. The operator was plainly negligent. Finally the violation was significant and substantial because traveling along this walkway presented a reasonable likelihood of a reasonably serious injury.

A penalty of \$100 is assessed.

Citation No. 2086674

Section 55.14-1 of the mandatory standards, 30 C.F.R. § 55.14-1, provides as follows:

Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; saw blades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded.

The citation describes the condition or practice as follows:

The guards on the two oil pumps did not extend around the back side of the "v" belts, leaving an opening to where a person could make contact with the pinchpoint, both motors had about 4 inch pulley and about 10" pulley on the pumps. High point was about three (3) feet above floor level and about three (3) from the wall of the enclosure, energized and subject to start, located in the No. 2 primary gyrator oil pump house.

points where the belts met the pulleys (point Exh. No. 13) (Tr. 157-158). In the inspector individual's hand could become caught at this 160, 161, 164-166). However, the operator's testified that it was highly unlikely if not impossible for an individual to become caught at the pinchpoint (Tr. 175-176). Based upon the photographic evidence produced by the Solicitor (MSHA Exh. Nos. 12 and 13) and the testimony of the inspector more persuasively that a violation existed. Since injury could result from a violation was serious. The operator was negligent in adequately guarding the machinery. Maintenance personnel required to be in the area in the performance of their regular duties. The violation was significant and dangerous because it was reasonably likely that a slip, trip, or fall accident would expose miners near the machine to a possibly serious injury.

A penalty of \$75 is assessed.

Citation No. 2086888

Section 55.16-6 of the mandatory standard for safety health § 55.16-6, provides as follows:

Valves on compressed gas cylinders shall be protected by covers when being transported, and by a safe location when the cylinders are in use.

The citation describes the condition or violation as follows:

The acetylene and oxygen cylinders were observed in the walkway between No. 10 and No. 11 mills. The gauges were mounted on the cylinders which were in an "off" position and secured in a hand cart in an upright position. This area was traveled hourly by maintenance personnel. Also an overhead crane was in use. The lifting rig was not assigned to anyone in the area. 1100 hour to 0700 hour shift may use them.

There is no dispute with respect to the violation found by the inspector. The inspector found two acetylene and oxygen cylinders in the walkway between the No. 10 and No. 11 mills.

questioned miners in the area but no one admitted to using the cylinders (Tr. 199-200). The inspector concluded that the cylinders had been left by someone on the prior shift (Tr. 200, 205). The issue presented is whether the situation is covered by the mandatory standard. The workers in the area to whom the inspector spoke said they were not assigned to work with the cylinders (Tr. 199-200). According to the inspector the mill foreman said the cylinders might have been used on the prior shift (Tr. 200). One individual the inspector spoke to said they were going to take the cylinders back to the repair bay area (Tr. 201). The inspector concluded that on the present shift, no one was assigned to the tanks which were going to be taken to the bay area (Tr. 201). The inspector concluded that the cylinders were stored and that a violation existed because they were not protected by covers.

In Secretary of Labor v. FMC Corporation, -- FMSHRC -- July 2, 1984), the Commission defined "storage" as follows: In ordinary usage, the term storage, 'the act of storing or the state of being stored', covers a wide variety of meanings, including to accumulate, to supply, to amass, or to keep for future use." The Commission decided that the term was sufficiently broad to include short-term, long-term, and semi-permanent storage. In FMC, a blasting agent was improperly left in a supply yard for over an hour and some of it had not been moved for more than six hours. In this case, the shift had started at 7:00 a.m. and the inspector saw the cylinders just before 9:00 a.m. He was justified in concluding that they had been left from the prior shift. The interval in this case falls within the time frame held by the Commission to constitute "storage" under a comparable mandatory standard. Therefore, I conclude that the cylinders were being stored temporarily or semi-permanently before being transported to the bay area. Due to the lack of covers on the cylinders, a violation existed.

The inspector testified that the cylinders could become airborne projectiles if the valve stem broke while the cylinder was tipped (Tr. 202-203). I find this could easily happen since the area was traveled hourly and hoses were present on which a person could trip (Tr. 206). The violation was serious. I further find the operator was negligent. Both the foreman on the prior shift and the foreman on the shift in progress had ample time and opportunity to discover this condition and correct it. I reject the inspector's excuse for failing to cite this violation as sig-

The operator is Ordered to pay the following amount within 30 days from the date of this decision:

<u>Citation No.</u>	<u>Amount</u>
2086972	\$ 75
2086667	125
2086671	70
2086672	100
2086674	75
2086888	250
Total	<u>\$695</u>

A large, stylized handwritten signature in black ink, appearing to read 'Paul Merlin'.

Paul Merlin
Chief Administrative

Distribution:

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SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 83-74-M
Petitioner	:	A.C. No. 20-02514-05501
v.	:	
	:	Docket No. LAKE 83-75-M
MEDUSA CEMENT COMPANY,	:	A.C. No. 20-00038-05501
Respondent	:	
	:	Docket No. LAKE 83-76-M
	:	A.C. No. 20-00038-05502
	:	
	:	Docket No. LAKE 83-77-M
	:	A.C. No. 20-00038-05503
	:	
	:	Docket No. LAKE 83-80-M
	:	A.C. No. 20-00038-05504
	:	
	:	Docket No. LAKE 83-81-M
	:	A.C. No. 20-02514-05502
	:	
	:	Medusa Cement Company Plant

DECISION

Appearances: Rafael Alvarez, Esq., Office of the
 Solicitor, U.S. Department of Labor,
 Chicago, Illinois, for Petitioner;
 Ralph M. Richie, Safety Director, Medusa
 Cement Company, Cleveland, Ohio, for
 Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

The above cases involve 48 alleged violations of mandatory safety standards cited during inspections in April and May, 1983. Respondent contested the penalties assessed by MSHA and the Solicitor filed proposals for penalty which were docketed in the Review Commission. Subsequently, the parties agreed to settle the violations for the amount originally assessed and motions for approval of the settlement

agreements were submitted. The Chief Administrative Judge denied the settlement proposals and assigned cases to me.

Pursuant to notice, the cases were heard in Michigan, on June 21, 1984. During an on the record discussion between the representatives of both parties, the taking of testimony from Federal Mine Inspector Ronald J. Baril and Clyde C. Brown for Petitioner Safety Director William Nall and Safety Committee member Richard Putman for Respondent, the parties agreed to the violations for the penalties listed herein. I noted the record that I would approve the settlement agreement.

FINDINGS AND CONCLUSIONS APPLICABLE TO ALL VIOLATIONS

1. Respondent owns and operates a mill in Calhoun County, Michigan, which produces cement. It is a subsidiary of the Crane Company and is a relatively large operation. Respondent operates the subject mill on a seasonal basis.

2. Respondent has a modest history of prior violations.

3. The penalties assessed herein will not affect Respondent's ability to continue in business.

4. Respondent admits the violations charged in the citations involved herein.

5. All of the violations involved in these citations were abated promptly and in good faith.

DOCKET NO. LAKE 83-74-M

Citation No. 2088977

This citation charged a violation of 30 C.F.R. § 56.16-6 because of the failure to place covers over the stems of oxygen and acetylene tanks. The inspector testified that this was a technical violation and no harm was presented. The violation was originally assessed at \$20 and the parties proposed to settle for \$20. I accepted the representations made at the hearing and approved the proposed settlement.

This citation charged a violation of 30 C.F.R. 56.9-2, because a rear view mirror was missing from a haul truck. The violation was originally assessed at \$20 and the parties proposed to settle for \$50. I approved the proposed settlement.

Citation No. 2088979

This citation charged a violation of 30 C.F.R. 56.4-24(d), because of a defective fire extinguisher on a mill. The inspector testified that this was a significant and substantial violation. The violation was originally assessed at \$39, and the parties proposed to settle for \$100. I approved the proposed settlement.

Citation No. 2088980

This citation charged a violation of 30 C.F.R. 56.9-2, because a rear view mirror was missing from a haul truck. The violation was originally assessed at \$20 and the parties proposed to settle for \$50. I approved the proposed settlement.

Citation No. 2088994

This citation charged a violation of 30 C.F.R. 56.12-25 because a portable extension cord light was not grounded. The cord was used only for lighting purposes and did not present any hazard to employees. The violation was originally assessed at \$20 and the parties proposed to settle for \$20. I approved the settlement.

Citation No. 2088995

This citation charged a violation of 30 C.F.R. 56.12-14, because an employee was moving a power shovel without proper protective equipment. The equipment was provided by Respondent, and the employees were instructed to use it, but the employee in question failed to use it. The violation was originally assessed at \$68 and the parties proposed to settle for \$68. I approved the settlement.

Citation No. 2088996

Citation No. 2089074

This citation charged a violation of 30 C.F.R. § 56.11-2 because of a missing section on a handrail walkway. Maintenance has just been performed in the area and the top section of the handrail had been removed in order to perform the work. Supervisory personnel were not aware that the handrail had not been replaced. The citation was originally assessed at \$68 and the parties proposed to settle for \$68. I approved the proposed settlement.

Citation No. 2089075

This citation charged a violation of 30 C.F.R. § 56.11-12 because of an opening above a conveyor which a person could fall. The plant had just gone into production for the season and the area had not been taken care of. The violation was originally assessed at \$85 and the parties proposed to settle for \$85. I approved the proposed settlement.

Citation No. 2089076

This citation charged a violation of 30 C.F.R. § 56.12-34 because of a portable light bulb hanging "shoot" without being guarded. The violation was originally assessed at \$68 and the parties proposed to settle for \$68. I approved the proposed settlement.

Citation No. 2089077

This citation charged a violation of 30 C.F.R. § 56.11-1 because of a material build-up on a walkway. Again, the plant had just started operating, and the company had not yet completed cleaning its many walkways. The violation was originally assessed at \$85 and the parties proposed to settle for \$85. I approved the proposed settlement.

Citation No. 2089078

This citation charged a violation of 30 C.F.R. § 56.14-6 because of a missing guard on a tail pulley.

top rail and a midrail. The area was not active at the time. There was no loose material on the deck. The violation was originally assessed at \$20 and the parties proposed to settle for \$20. I approved the proposed settlement.

Citation No. 2089043

This citation charged a violation of 30 C.F.R. § 56.14-6 because of an unguarded pinch point. The violation was originally assessed at \$112 and the parties proposed to settle for \$112. I approved the proposed settlement.

Citation No. 2089044

This citation charged a violation of 30 C.F.R. § 56.16-5 because compressed gas cylinders were not properly secured. The cylinders had just been used and the employees neglected to chain them up. The violation was originally assessed at \$68 and the parties proposed to settle for \$68. I approved the proposed settlement.

Citation No. 2089045

This citation charged a violation of 30 C.F.R. § 56.12-34 because a portable extension cord with exposed wires and a broken light bulb in its socket was plugged in and lying on the floor. The cord had just been used by an employee and was left on the floor. The violation was originally assessed at \$136 and the parties proposed to settle for \$136. I approved the proposed settlement.

Citation No. 2089047

This citation charged a violation of 30 C.F.R. § 56.14-7 because a guard on the V-belt drive was in bad repair, exposing pinch points. The area was a restricted walkway. The violation was originally assessed at \$112 and the parties proposed to settle for \$112. I approved the proposed settlement.

Citation No. 2089061

This citation charged a violation of 30 C.F.R. § 56.12-25 because of the failure to ground an extension cord to a water softener. The violation was originally assessed at \$39 and the parties proposed to settle for \$20. I approved the proposed settlement.

Citation No. 2089062

This citation charged a violation of 30 C.F.R. § 56.12-8 because of failure to provide a bushing for a wire entering the drive motor of the crusher pan feeder. No bare wires were involved and the violation was in an area not accessible to employees. The violation was originally assessed at \$20 and the parties agreed to settle for \$20. I approved the proposed settlement.

Citation No. 2089065

This citation charged a violation of 30 C.F.R. § 56.14-6 because a guard over a pinch point had been removed while the machine was operating. The violation was originally assessed at \$30 and the parties proposed to settle for \$50. I approved the proposed settlement.

Citation No. 2089066

This citation also charged a violation of 30 C.F.R. § 56.14-6 because of the same condition as in the previous citation. The violation was originally assessed at \$30 and the parties proposed to settle for \$50. I approved the proposed settlement.

DOCKET NO. LAKE 83-75

Citation No. 2088998

This citation charged a violation of 30 C.F.R. § 56.14-6 because of failure to have guarding on the tail pulley of the conveyor belt. The tail pulley would be approached during greasing operations when the machine was shut down. The pinch area is guarded by location. The violation was originally assessed at \$20 and the parties proposed to settle for \$20. I approved the proposed settlement.

Citation No. 2088999

This citation charged a violation of 30 C.F.R. § 56.14-1 because of failure to provide guarding for a conveyor belt head pulley. The guard had been removed and the employee failed to replace it. The area is isolated and would be visited only for maintenance. The violation was originally assessed at \$112, and the parties proposed to settle for \$112. I approved the proposed settlement.

Citation No. 2089067

This citation charged a violation of 30 C.F.R. § 56.12-16 because Respondent put drive belts on a drive motor without locking out the system. Respondent has a written lock out procedure and all employees are provided with locks. The employee involved was aware of the procedure. The violation was originally assessed at \$54, and the parties proposed to settle for \$54. I approved the proposed settlement.

Citation No. 2089068

This citation charged a violation of 30 C.F.R. § 56.4-24(d) because of Respondent's failure to service fire extinguishers. The contractor who serviced the fire extinguishers for Respondent has since been replaced. The violation was originally assessed at \$85 and the parties proposed to settle for \$100. I approved the proposed settlement.

Citation No. 2089069

This citation charged a violation of 30 C.F.R. § 56.11-3 because of the use of an 8 foot stepladder in bad repair. The ladder had been discarded by Respondent and placed in a refuse pile. An employee took it from the refuse pile and used it. The violation was originally assessed at \$39 and the parties proposed to settle for \$20. I approved the proposed settlement.

Citation No. 2089070

This citation charged a violation of 30 C.F.R. § 56.14-6 because of a defect in the guard for the take up pulley and counterweight. Employees are not normally in

Citation No. 2089074

This citation charged a violation of 30 C § 56.11-2 because of a missing section on a handwalkway. Maintenance has just been performed and the top section of the handrail had been removed in order to perform the work. Supervisory personnel were aware that the handrail had not been replaced. The citation was originally assessed at \$68 and the parties proposed to settle for \$68. I approved the proposed settlement.

Citation No. 2089075

This citation charged a violation of 30 C § 56.11-12 because of an opening above a conveyor which a person could fall. The plant had just started production for the season and the area had not been taken care of. The violation was originally assessed at \$85. The parties proposed to settle for \$85. I approved the proposed settlement.

Citation No. 2089076

This citation charged a violation of 30 C § 56.12-34 because of a portable light bulb hanging without being guarded. The violation was originally assessed at \$68 and the parties proposed to settle for \$68. I approved the proposed settlement.

Citation No. 2089077

This citation charged a violation of 30 C § 56.11-1 because of a material build-up on a conveyor. Again, the plant had just started operating, and the company had not yet completed cleaning its machinery. The violation was originally assessed at \$85 and the parties proposed to settle for \$85. I approved the proposed settlement.

Citation No. 2089078

This citation charged a violation of 30 C § 56.14-6 because of a missing guard on a tailshaft. The guard had been removed for clean up purposes and was not replaced. The violation was originally assessed at \$85 and the parties proposed to settle for \$85. I approved the proposed settlement.

Citation No. 2089079

This citation charged a violation of 30 C.F.R. § 56.11-2 because of a missing section of toeboard on a deck area. There was adequate handrailing - including a top rail and a midrail. The area was not active at the time. There was no loose material on the deck. The violation was originally assessed at \$20 and the parties proposed to settle for \$20. I approved the proposed settlement.

Citation No. 2089043

This citation charged a violation of 30 C.F.R. § 56.14-6 because of an unguarded pinch point. The violation was originally assessed at \$112 and the parties proposed to settle for \$112. I approved the proposed settlement.

Citation No. 2089044

This citation charged a violation of 30 C.F.R. § 56.16-5 because compressed gas cylinders were not properly secured. The cylinders had just been used and the employees neglected to chain them up. The violation was originally assessed at \$68 and the parties proposed to settle for \$68. I approved the proposed settlement.

Citation No. 2089045

This citation charged a violation of 30 C.F.R. § 56.12-34 because a portable extension cord with exposed wires and a broken light bulb in its socket was plugged in and lying on the floor. The cord had just been used by an employee and was left on the floor. The violation was originally assessed at \$136 and the parties proposed to settle for \$136. I approved the proposed settlement.

Citation No. 2089047

This citation charged a violation of 30 C.F.R. § 56.14-7 because a guard on the V-belt drive was in bad repair, exposing pinch points. The area was a restricted walkway. The violation was originally assessed at \$112 and the parties proposed to settle for \$112. I approved the

Citation No. 2089051

This citation charged a violation of 30 C.F.R. § 56.11-1 because of stored material on a walkway. The violation was originally assessed at \$85 and the parties proposed to settle for \$85. I approved the proposed settlement.

Citation No. 2089081

This citation charged a violation of 30 C.F.R. § 56.12-34 because of failure to provide guarding for an extension cord light close to a walkway. Only one person - the supervisor making an onshift examination - was using the walkway. The violation was originally assessed at \$20 and the parties proposed to settle for \$20. I approved the proposed settlement.

Citation No. 2089082

This citation charged a violation of 30 C.F.R. § 56.12-8 because a power cable lacked a restraint. The cable was grounded and there was little likelihood of any employee receiving an electrical shock or other injury. The violation was originally assessed at \$20 and the parties proposed to settle for \$20. I approved the proposed settlement.

DOCKET NO. LAKE 83-76-M

Citation No. 2089083

This citation charged a violation of 30 C.F.R. § 56.11-1 because of a buildup of cement on the walkway and the walkway at the bottom of the transfer elevator. The buildup was of loose material and was not likely to cause a violation. The violation was originally assessed at \$85 and the parties proposed to settle for \$85. I approved the proposed settlement.

looking for the pit. The violation was originally assessed at \$20 and the parties proposed to settle for \$20. I approved the proposed settlement.

DOCKET NO. LAKE 83-77-M

Citation No. 2089071

This citation charged a violation of 30 C.F.R. § 56.9-7 because the emergency stop cord on a conveyor was not properly located. The discussion brought out that the cord was within 12 inches of the pinch point and this conforms to present MSHA District policy. I determined that no violation was shown and vacated the citation.

Citation No. 2089072

This citation charged a violation of 30 C.F.R. § 56.9-7 because an accessible stop cord was not present along the entire length of the conveyor. Here the stop cord was 21 inches from the pinch point. The violation was originally assessed at \$20 and the parties proposed to settle for \$100. I approved the proposed settlement.

Citation No. 2089000

This citation charged a violation of 30 C.F.R. § 56.9-7 because emergency stop devices on both sides of a conveyor belt were 21 inches from the pinch points. The violation was originally assessed at \$20 and the parties proposed to settle for \$100. I approved the proposed settlement.

Citation No. 2089041

This citation charged a violation of 30 C.F.R. § 56.14-6 because the drive chain of an elevator was unguarded. The guard had been removed for repairs. The area had been roped off but was still accessible to employees. The violation was originally assessed at \$20 and the parties proposed to settle for \$20. I approved the proposed settlement.

Citation No. 2089042

This citation charged a violation of 30 C. § 56.9-11 because of a shattered windshield on a loader. The damaged had occurred on the same site inspection. The violation was originally assessed at \$136 and the parties proposed to settle for \$136. I approved the proposed settlement.

Citation No. 2089046

This citation charged a violation of 30 C. § 56.14-6 because of a missing guard on a rotary. The violation was originally assessed at \$112 and the parties proposed to settle for \$112. I approved the proposed settlement.

Citation No. 2089049

This citation charged a violation of 30 C. § 56.11-12 because a section of a wall had fallen and not cleaned up. Employees did not travel in the area. The violation was originally assessed at \$20 and the parties proposed to settle for \$20. I approved the proposed settlement.

Citation No. 2089050

This citation charged a violation of 30 C. § 56.20-3(a) because of material spilled on a walkway. This was hardened material and had apparently been there for some time. The violation was originally assessed at \$119 and the parties proposed to settle for \$119. I approved the proposed settlement.

Citation No. 2089080

This citation charged a violation of 30 C. § 56.20-3(a) because of equipment being present in a hallway presenting tripping hazards. The violation was assessed at \$85 and the parties proposed to settle for \$85. I approved the proposed settlement.

Citation No. 2089084

This citation charged a violation of 30 C. § 56.20-3(a) because of equipment being present in a hallway presenting tripping hazards. The violation was assessed at \$85 and the parties proposed to settle for \$85. I approved the proposed settlement.

grounded. Employees do not travel the area. The violation was originally assessed at \$20 and the parties proposed to settle for \$20. I approved the proposed settlement.

Citation No. 2089086

This citation charged a violation of 30 C.F.R. § 56.9-7 because the emergency stop devices on a conveyor belt were not operating. The violation was originally assessed at \$119 and the parties proposed to settle for \$119. I approved the proposed settlement.

DOCKET NO. LAKE 83-80-M

Citation No. 2089073

This citation charged a violation of 30 C.F.R. § 56.16-6 because of failure to cover the stems of compressed gas cylinders in a truck. The violation was originally assessed at \$39 and the parties proposed to settle for \$56. I approved the proposed settlement.

DOCKET NO. LAKE 83-81-M

Citation No. 2088997

This citation charged a violation of 30 C.F.R. § 56.14-1 because of the failure to provide guarding for the counterweight wheel at the No. 2 shaker stream. This was not a normal travelway and the only employees who would go in the area would be a supervisor for onshift examinations and an employee to do greasing. The machine would be deenergized for greasing. The violation was originally assessed at \$20 and the parties proposed to settle for \$20. I approved the proposed settlement.

Citation No. 2089063

This citation charged a violation of 30 C.F.R. § 56.4-24(d) because of failure to properly maintain and service a fire extinguisher. The violation was originally assessed at \$39 and the parties proposed to settle for \$100. I approved the proposed settlement.

Citation No. 2089064

violation was originally assessed at \$39 and proposed to settle for \$39. I approved the settlement.

ORDER

I have considered and approved the proposals in the light of the criteria in section Act. Respondent is ORDERED to pay within 30 date of this decision the following civil pen

<u>CITATION NO.</u>	<u>PENALTY</u>
2088977	\$ 20
2088978	50
2088979	100
2088980	50
2088994	20
2088995	68
2088996	50
2089061	39
2089062	20
2089065	50
2089066	50
2088998	30
2088999	112
2089067	54
2089068	100
2089069	20
2089070	20
2089074	68
2089075	85
2089076	68
2089077	85
2089078	112
2089079	20
2089043	112
2089044	68
2089045	136
2089047	112
2089048	20
2089051	85
2089081	20
2089082	20
2089083	85
2089085	20
2089071	vacated

2089000	100
2089041	20
2089042	136
2089046	112
2089049	20
2089050	119
2089080	85
2089084	20
2089086	119
2089073	56
2088997	20
2089063	100
2089064	39
Total	<u>\$3,015</u>

James A. Broderick
 James A. Broderick
 Administrative Law Judge

tribution:

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 artment of Labor, 230 South Dearborn Street, Chicago, IL
 04 (Certified Mail)

ph M. Richie, Director of Safety and Office Services,
 usa Cement Company, Box 5668, Cleveland, OH 44101
 rtified Mail)

THOMAS E. JONES,
Respondent

:
:
:

DECISION

Appearances: J. Philip Smith, Esq., Office of
U.S. Department of Labor, Arlington
for Petitioner;
John A. Snow, Esq. VanCott, Bagl
McCarthy, Salt Lake City, Utah,
for Respondent.

Before: Judge Vail

STATEMENT OF THE CASE

This a civil penalty proceeding under sec
Federal Mine Safety and Health Act of 1977, 30
seq. (the Act). 1/ The Secretary seeks a civi
respondent, Thomas E. Jones (Jones), a mine ma
at the Alchem Trona Mine operated by Allied Ch
(Allied) near Green River, Wyoming.

Jones is charged with knowingly authorizi
carrying out as an agent, the corporate mine o
of the mandatory safety standard 30 C.F.R. § 5
provides as follows:

Immediately before and continuously du
or cutting with an arc or open flame o
with an open flame, in other than fres
places where methane is present, or ma
air current, a competent person shall
with a device approved by the Secretar
methane.

1/ Whenever a corporate operator violates a m
safety standard ... , any director, officer, o
corporation who knowingly authorized, ordered,
such violation ... shall be subject to the sam
fines, ... that may be imposed upon a person u
(a) and (d).

were taken with CSE Model 102 methane detector, the charge was checked after the readings and was found be 3.8. The detector was last calibrated 0015 hours 4/2/80. The panel foreman was aware that his men were welding at this location.

Jones denied the allegation.

After notice to the parties, a hearing on the merits was held in Green River, Wyoming. Post-hearing briefs have been filed by both parties. Based on the evidence presented at the hearing and the contentions of the parties, I make the following decision. To the extent that the contentions of the parties not incorporated in this decision, they are rejected.

STIPULATIONS

At the hearing, the parties agreed to the following stipulations which were accepted (Transcript at 5).

1. Federal Mine Safety and Health Review Commission (Commission) has jurisdiction over the matter at issue here.
2. Allied Chemical Corporation is, in fact, a corporation.
3. Thomas E. Jones is an agent of Allied Chemical Corporation.

FINDINGS OF FACT

1. On April 1, 1980, Melvin R. Jacobson received a telephone call from a Thomas C. Dean. Jacobson is the supervisor in the Green River, Wyoming, Mine Safety and Health Administration (MSHA) field office. Dean is a miner and employee of Allied Chemical Corporation at their Alchem Trona Mine. Dean stated that during the graveyard shift on March 31, 1980, Thomas E. Jones, a supervisor, allowed a piece of schedule 24 equipment (lube truck) to be parked and operated in and beyond the last open cross-cut in the south area of the mine. Also, that we

cross-cut. Dean further stated that welding was being conducted during the welding operation (Tr. at Exhibit P-1).

2. As a result this complaint, Jacobson sent MSHA inspectors William W. Potter and Robert Kinterknecht to Alchem Trona Mine to conduct an investigation.

3. On April 1, 1980, Dean had arrived at the J.M.E. panel of the Alchem Trona Mine at approximately 12:00 a.m. to commence work on the graveyard shift. Dean's job was to use an acetylene torch to cut out the bit holders on the face of the continuous miner. Thomas E. Jones, the foreman, conducted a methane check at 12:30 or 1:00 a.m. on the graveyard shift (Tr. at 24). No other methane test was conducted by Jones on the graveyard shift at the location of the continuous miner. Dean was working (Tr. at 26).

4. During the lunch hour on the graveyard shift on April 1, 1980, Dean and Bernie Caldwell told Jones that they had observed welding in the last open cross-cut. Jones didn't allow the miners (Tr. at 32 and Exh. P-3).

5. On April 2, 1980, at approximately 1:00 a.m., Dean again made a pre-shift examination for methane in the J.M.E. panel (Tr. at 38). MSHA inspectors Potter and Kinterknecht arrived at the mine at 1:45 a.m. on April 2, 1980, to investigate Dean's complaint of welding in the last open cross-cut of the J.M.E. panel. The two inspectors proceeded underground with Jones at approximately 2:25 a.m. The group then proceeded to the J.M.E. panel arriving at approximately 2:40 a.m. and observed a miner welding in the last open cross-cut. Jones conducted one monitoring for methane (Tr. at 89). Potter issued Citation No. 576827 (Exh. P-2).

6. At the time the citation was issued, the continuous miner was parked in the last open cross-cut of the J.M.E. panel with the head in the drift or No. 3 road (Tr. at 91). Potter took 10 methane readings in the drift with a methanometer. The first test was at the point where welding was being performed and the reading was .0%. The next test was at a location just inside the cross-cut towards the face and the reading was .02%, and a few feet nearer the face, a reading of .05% was registered. As Potter progressed towards the drift, the readings were from .04% to a .6% at the end of the drift (Tr. at 93 and Exh. P-4). The Alchem Trona Mine is considered a gassy mine and is subject to a MSHA five day inspection (Tr. at 95).

methane where the welding was being done (Tr. at 101).

ISSUES

The issues in this proceeding are:

1. Whether Jones, as an agent of the corporate operator, knowingly authorized, ordered, or carried out a violation of 30 C.F.R. § 57.21-127

2. If so, the appropriate civil penalty that should be assessed against Jones for the said violation of the Act.

DISCUSSION

Jones admits in his testimony that on April 2, 1980, as maintenance foreman, he was assigned the task of having certain maintenance work performed in the J.M.E. panel of Allied's Alchirona Mine. This included repairs to a continuous miner located in said panel. After Jones received his assignment, and fire-crossed the J.M.E. panel at 1:00 a.m., he assigned miners of his crew to various jobs. Two miners were assigned specifically to perform work which involved welding on the continuous miner (Tr. at 171-173).

Jones further admitted that the continuous miner had been moved earlier to the last open cross-cut of the panel but could not be taken further from the face area because of various obstructions, so repairs were made while the miner was in the last open cross-cut (Tr. at 177-183).

Jones further testified that the last open cross-cut in the J.M.E. panel is not a return air corridor, as in other mines, but contains fresh air (Tr. at 236). For ventilation purposes, Allied uses a system of tubing designed to remove dirty air (air that may contain methane) from the face. Jones also admits in his brief, that although the continuous miner was in fresh air under Allied's safety practices, when welding is done in the last open cross-cut, continuous monitoring for methane is required (Resp's brief at p. 3). Jones further admits that he knew about a memorandum issued by Allied on March 4, 1976 which stated such a requirement. (Exh. P-5).

On April 2, 1982, all of Allied's continuous methane monitors were under repair and not available to Jones for use during the work being performed on the continuous miner (Tr. at 172, 173). However, he contends that he had been instructed by

at p. 4). Jones contends that he specifically followed the procedure on April 2, 1980. One methane reading was taken when the miners were setting up their equipment to start the second reading approximately 15 minutes later. This time he was called to leave the area and meet the inspectors (Tr. 190-191).

Randy Dutton, safety engineer for Allied, testified that in the later part of March, 1980, the maintenance superintendent inquired if work could be done in the last open cut using hand-held methane monitors as the continuous monitor was not working. Dutton said he did not know and would have stated that he called the MSHA district office and Jacobson, the supervisor, that the continuous monitor was not working and inquired whether it was permissible to weld beyond the last open cross-cut using hand-held monitors. Dutton claims Jacobson said they could if they monitored for methane every ten to fifteen minutes. This information was passed on to the maintenance supervisor of the mine (Tr. 225).

Jacobson denied that he had a telephone conversation with Dutton in March of 1980, and in fact, was not well acquainted with him. Jacobson checked a telephone log which is kept at the MSHA office of all calls he receives and found no calls from Dutton for the period of time involved here. Jacobson noted in his log that on May 4, 1980, Dutton had called the MSHA office after the accident (Tr. at 260, 261). However, Jacobson did not recall a call from Dutton, in the spring of 1981, after Dutton became MSHA District Director, involving a proposed regulation to cover welding in the last open cross-cut (Tr. at 262).

From the conflicting testimony regarding this matter, the court finds the testimony of Jacobson more persuasive than that of Dutton. Jacobson was able to produce his telephone log to support his statements that the alleged conversation took place. There was no written evidence or corroboration that he had this conversation and received approval for monitoring every 15 minutes as he alleged.

Even assuming, however, that Jones was told by Dutton that he could monitor every 15 minutes for methane in the last open cross-cut when welding, his defense must fail because the evidence in this regard clearly demonstrates that

...ed that he observed Jones make this one check each day at 23, 24 and 36, 37). However, both Dean and Caldwell testified that they did not observe Jones make any further checks for methane on either day. It was after a discussion in the room on April 1, 1980, that welding in the last open cross-cut without methane monitoring was dangerous and receiving no response from Jones, that Dean telephoned the MSHA and reported the matter. The seriousness of taking such action by Dean gives credence to his concern about the practice. It supports his contention that no monitoring was going on. The evidence does not show that Dean was a complainer or raised many complaints often. Also, his testimony was corroborated by another miner Caldwell who was able to observe whether Jones made such methane checks as Jones claimed. There was testimony on the part of Jones that due to welding glasses and mask, the miners could not observe the tests being made. I do not believe this to be valid as both men should have seen one or more tests being made during a whole shift, if they were being done as testified by Jones. Also, not one miner or witness of his whole shift testified that the tests were conducted during the dates involved.

Based upon the entire record in this case, I find that Jones was aware of the requirement to check continuously for methane during welding in the last open cross-cut. Also, that he ordered Caldwell and Dean to perform welding work in this area on April 2, 1980, and did not monitor for methane but once during the entire shift. I find this is a violation of Section 101-12.

It was also shown by the evidence that the corporate attorney, Allied was found to have violated § 57.21-12 involving citation No. 576827 and paid a penalty assessment of \$1000. See Secretary of Labor v. Allied Chemical Corporation, 1980 Docket No. WEST 80-478-M, 3 FMSHRC 2387 (ALJ) and Exhibit

CONCLUSION

I find the failure on the part of Jones to check for methane and not supply the miners with methane checking devices and instruct them to make the necessary continuous test is gross negligence. As a supervisor, he was aware of the company memorandum requiring such tests. Also, assuming arguendo that Jones

gassy mine and should methane gas enter the area while
was being done, an explosion could occur causing serious
or death to the several miners working in the area.
this was a fresh air area, it was admitted that a rock
occur which would allow methane to enter the area where
miners were working.

In regards to Jones, he has no record or history of
violations under the Act. The violation was abated
by Jones giving one of the miners his methane monitor.
no evidence presented in this case as to Jones financial
condition or ability to pay a reasonable penalty if
assessed against him. I find based upon the above that
reasonable penalty in this case.

ORDER

Based upon the above findings of fact and conclusions of
law, respondent Jones is ORDERED to pay the sum of \$
days of the date of this decision for the violation
to have occurred.



Virgil E. Vail
Administrative Law Judge

Distribution:

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/blc

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 84-21-M
Petitioner	:	A.C. No. 05-03890-05501
v.	:	
	:	Mackey No. 444 Mine
CREEK GOLD MINES CO.,	:	
Respondent	:	

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Mr. Lowell E. Jarratt, President, Elk Creek Gold
Mines Co., Lakewood, Colorado, pro se,
for Respondent.

Before: Judge Carlson

GENERAL STATEMENT

This case arose out of the inspection of an underground
gold and silver mine near Black Hawk, Colorado, owned by Elk
Creek Gold Mines Co. (Elk Creek). A hearing on the merits was
held on May 23, 1984 in Denver, Colorado under provisions of
the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801
et seq. (the Act). The Secretary seeks civil penalties for
alleged violations of standards promulgated under the Act.

The parties waived the filing of post-hearing briefs.

ISSUES

The essential questions to be decided are:

- (1) Whether respondent operator was responsible
under the Act for any or all of the violations
alleged, or whether the liability, if any,
lay with an independent contractor.
- (2) To the extent that respondent may have been
responsible, whether the alleged violations
occurred, and, if so, what civil penalties are

the Secretary's sole witness, visited the site of No. 444 Mine, where this case arose. The evidence is a report from a State of Colorado mine inspector Mackey's federal inspection. It further shows that at the time of inspection the mine, closed for many years, was reopened by Elk Creek Gold Mines Co., the respondent. The corporation had been formed to take over the Mackey production. Mr. Lowell E. Jarratt, respondent's attorney at the hearing, is president of the company and general manager of the mine.

On the date of Kerber's inspection, shaft drilling was the only activity at the site. (The original shaft was driven many years before.)

Kerber's four citations involved respondent's failure to register the mine as required by the Secretary's regulations, failure to post warning signs near the explosives, failure to post warnings near a fuel tank, and a failure to provide a berm at the edge of a dump site.

The Contractor Defense

It is undisputed that Elk Creek had entered into an agreement with a Ted Anderson to drive the new 30-ton hauler (respondent's exhibit 1). Signed on June 10, 1964, the agreement provided that Anderson would provide the miners, fuel, and provide certain tools and personal equipment to the miners.

No one disputes that the fuel tank and explosives were owned by Elk Creek, as was the small front-end loader used to remove muck from the shaft.

On the two successive days of his inspection, Kerber observed two miners blasting in the shaft and dumping muck with Elk Creek's front-end loader. These men were not Anderson that neither was in charge, but that both were working for Anderson. Kerber saw these men dumping muck over the edge of which was not protected by a berm.

on the contract.

With respect to the magazine, fuel tank, and the berm citations, Elk Creek contends that the full responsibility for compliance lay with Anderson as an independent contractor. As Mr. Jarratt put it: "I wasn't watching those things because it was his [Anderson's] responsibility, so I'm asking that these charges be dismissed." (Transcript at 35.)

The relationship between Elk Creek and Anderson had the earmarks of an agreement between an owner and an independent contractor. The Act is enforceable against mine "operators." By definition, independent contractors are "operators," 30 U.S.C. § 802(d). The Secretary of Labor has promulgated a regulation which provides guidelines to his inspectors as to when to cite the owner-operator, when to cite an independent contractor, or when to cite both. 30 C.F.R. § 45, Appendix A. The guidelines are lengthy, but generally give weight to such matters as which party contributed to the creation of a violation, whose employees are exposed to the hazards flowing from a violative condition, and who had control over the conditions that needed abatement. In Phillips Uranium Corporation, 4 FMSHRC 549 (1982), the Commission majority took the position that citations issued against owners may be dismissed where the Secretary's decision to proceed against the owner, rather than a contractor, was not consistent with the purposes and policies of the Act. The Act, according to the majority, mandates that contractors who created violative conditions and who are in the best position to eliminate the attendant hazards and to prevent their recurrence should be the subject of the Secretary's enforcement efforts.

In the present case it is clear that the duty to post warning signs at the powder magazines was that of the owner, Elk Creek. It owned the magazine and supplied the powder. Moreover, the two shareholders working outside the portal were plainly "miners" under the broad definitions of the Act, and must be considered Elk Creek's employees since they were not Anderson's. An explosion of the magazine would have endangered them as well as Anderson's two miners at the site. For these reasons, the citation was properly issued to Elk Creek.

The inspector found no record of a filing by Elk Creek, therefore issued a citation for a failure to register under regulation.

Elk Creek acknowledges that it failed to file a follow-up notification. It defends, however, on the basis that Mr. Jarratt personally visited the MSHA district manager on or about May 1983 to inquire about requirements under the Act. The manager provided certain materials to him, but at no time mentioned the notification requirement.

Although Mr. Jarratt's visit to the manager's office demonstrated an admirable desire to comply with the governing rules, it cannot serve as the basis for an outright dismissal of the citation. There is no evidence that the manager deliberately misled Jarratt. The requirement of the notification rule is absolute, and constitutes an essential element of the enforcement scheme under the Act.

Additionally, the evidence indicates that more than a year had elapsed since work at the mine site had begun. Arrangements for the reopening had begun in June, and by the time of the inspector's visit the shaft had progressed some 230 feet with only a two-man crew working.

The violation is established. Elk Creek's manifested good faith is a favorable factor to be weighed in assessing the violation.

Significant and Substantial Charge

The Secretary classified the violation involving the absence of a berm at the edge of the dump area as "significant and substantial" under section 104(d) of the Act. In Cement Division v. National Gypsum Company, 3 FMSHRC 822 (1981), the Commission defined such a violation as one where "... there exists a reasonable likelihood that the hazard contributed to will result in injury or illness of a reasonably serious nature."

The evidence presented in this case shows that the Secretary's classification was correct. The absence of a berm or similar barrier at the brink of the embankment presents a realistic possibility that a miscalculation or momentary inadvertence could cause a front-end loader to go over the edge while dumping muck. Were that to happen, the equipment could quite clearly suffer serious injury or even death.

S

Secretary seeks a civil penalty of \$20.00 for each of violations in this case, except for the berm violation, for \$4.00 is proposed. Section 110(i) of the Act requires the Secretary, in penalty assessments, to consider the operator's degree of negligence, its good faith in seeking rapid compliance, history of prior violations, the effect of a monetary penalty on the operator's ability to continue in business, and the gravity of the violation in itself.

Actually all these factors weigh heavily in Elk Creek's case. The operation is quite small. Management's belief that the operator bore the responsibility for most of the areas in which the violations arose, though in error, was held in obvious truth. For that reason I consider the level of negligence to be very low. The record showed that the company achieved abatement of all infractions. The mine had no history of violations. Only the violation involving the lack of a berm presents any appreciable degree of gravity.

I must note, though, that the Secretary obviously considered these mitigating factors since the penalties proposed are conservative. Also, there is no evidence that the imposition of modest penalties would interfere with Elk Creek's ability to continue in business.

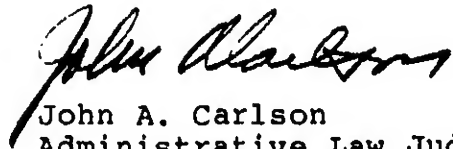
Having weighed the evidence, I must hold that \$20.00 is the appropriate penalty for the failure to post warning signs at the fueling zone (citation 2098576), and that \$20.00 is likewise appropriate for the lack of warning signs in the fueling area (citation 2098578). Because of the greater gravity of the berm violation, (citation 2098579), the proposed penalty of \$54.00 is appropriate.

In light of the exemplary efforts made by Elk Creek to meet the government's requirements upon reopening a mine, the most minimal penalty is warranted for the failure to provide formal notification. I conclude that a sum of \$5.00 is appropriate.

- (1) That the Commission has jurisdiction to decide the matter.
- (2) That respondent Elk Creek was the proper recipient of the citations issued by the Secretary.
- (3) That Elk Creek violated the standard published 30 C.F.R. § 57.6-20(i) as charged in citation and that \$20.00 is the appropriate penalty for violation.
- (4) That Elk Creek violated the standard published 30 C.F.R. § 57.4-2 as charged in citation 2098 and that \$20.00 is an appropriate penalty for violation.
- (5) That Elk Creek violated the standard published 30 C.F.R. § 57.9-54 as charged in citation 2098 that the violation was "significant and substantial" and that \$54.00 is the appropriate penalty for violation.
- (6) That Elk Creek violated the rule published at 30 C.F.R. § 41.11 as charged in citation 20997 and that \$5.00 is an appropriate penalty for violation.

ORDER

Accordingly, the four citations in this case are ORDERED affirmed, and Elk Creek is ORDERED to pay a total civil penalty of \$99.00 within 30 days of the date of this decision.


John A. Carlson
Administrative Law Judge

tribution:

S. H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294 (Certified Mail)

Lowell E. Jarratt, Elk Creek Gold Mines Company, 815 Kendall Street, Lakewood, Colorado 80214 (Certified Mail)

AUG 7

SECRETARY OF LABOR,	:	CIVIL PENALTY PROC
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 83-
Petitioner	:	A.C. No. 35-00540-0
	:	
v.	:	Ross Island Plant
	:	
ROSS ISLAND SAND & GRAVEL	:	
COMPANY,	:	
Respondent	:	

DECISION

Appearances: Robert A. Friel, Esq., Office of the Secretary of Labor, Department of Labor, Seattle, Washington, for Petitioner;
Mr. R.G. Tuttle, Corporate Director, Ross Island Sand and Gravel, Portland, Oregon, appearing Pro Se.

Before: Judge Vail

STATEMENT OF THE CASE

In the above proceeding, the Secretary of Labor Mine Safety and Health Administration (MSHA), seeks civil penalties against the respondent for two alleged violations of mandatory safety standards. The violations were characterized by citations issued on June 1, 1983, which violations were considered significant and substantial, and penalty of \$20.00 each was proposed. The respondent initially contested the citations.

On September 6, 1983, respondent wrote the Secretary offering a check in the sum of \$40.00 to settle the above. On September 19, 1983, the Secretary submitted a Motion to Approve Settlement to the Commission proposing that the case be accepted in full settlement. The motion was denied and a hearing was issued to the parties to submit additional information. Additional information was submitted and again the Secretary's proposal was denied. The case was then assigned to the Commission for hearing.

The case was heard on the merits on June 22, 1984. Robert K., MSHA inspector testified on behalf of petitioner. Paul Sil testified on behalf of respondent. Post hearing briefs waived.

ISSUES OF FACT CONCLUSIONS OF LAW

Respondent is a medium sized operator. It employs approximately 15 miners at its Ross Island Plant. Payment of a substantial penalty will not impair respondent's ability to continue in business. Respondent demonstrated good faith in correcting the two cited conditions (Transcript at 13, 14). In the previous 24 months, respondent had no citations.

Respondent admits that the two violations cited on June 1, 1983, in citations Nos. 2225917 and 2225918 existed. However, it minimizes the negligence and gravity of conditions involved in the citations (Tr. at 14).

Citation No. 2225917

On June 1, 1983, a citation was issued to the respondent alleging a violation of 30 C.F.R. § 56.11-1. Respondent was cited for a work deck area behind the scalper screen being cluttered with wood and other debris.

In respondent's mining process, material is dredged from a conveyor, loaded on barges and clam-bucketed onto a hopper. The scalper screen is at the top of a hopper and collects debris in the material where it starts to be processed. A miner (stick picker) stands on a platform and picks wood and debris from this material as it accumulates. The wood and debris is laid in a pile on the platform where the stick picker works. The platform on which the miner works is also a walkway approximately 8 feet wide. One person, the stick picker, is on this platform and exposed to the danger of tripping and falling if debris or wood accumulates. The inspector testified that from the size of the pile he estimated it to be an accumulation of two days work. An accident from tripping could cause lost workdays or restricted

Respondent admitted the violation but contends that the pile of wood and debris is usually cleaned up at a point half way through the shift. It is argued that removing the debris in this manner is preferred over throwing the material over the side of

exposed to injury at this location at a given time and would be from tripping and falling and would in likelihood be serious or fatal. Based on a consideration of the critical section 110(i) of the Act, I conclude that an appropriate penalty for the violation is \$20.00.

Citation No. 2225918

On June 1, 1983, Citation No. 2225918 was issued to respondent alleging a violation of 30 C.F.R. § 56.16-5 for an acetylene bottle located in the welding bay not being secured. Funk testified that he observed one acetylene bottle in respondent's welding bay area which was not in the rack specified for storing such bottles. The risk to such a condition is that if the bottle were to fall over, acetone in the bottle could leak into the valve causing it to deteriorate and leak and cause an explosion. Funk admitted that it was unlikely that an accident would occur.

Respondent admitted the above facts but contends that the bottle was empty. Also, that hoses attached to acetylene cylinders have flashback arresters to eliminate the danger of flashback and causing a fire. Based on a consideration of the critical section 110(i) of the Act, I conclude that an appropriate penalty for the violation is \$20.00.

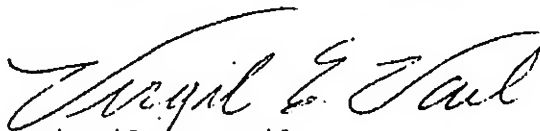
CONCLUSION

My assessment of the penalties herein is as follows:

1. Respondent is a medium sized operator.
2. Respondent was negligent in permitting each of the violations to occur.
3. A penalty will have no effect on respondent's ability to continue in business.
4. Respondent had no prior citations in the past.
5. The violations are not serious.
6. Respondent showed good faith in achieving rapid compliance.

ORDER

Based upon the above findings of fact and conclusions of law, respondent is ORDERED to pay the total sum of \$40.00 for two violations found herein to have occurred. I understand respondent has previously submitted payment of the \$40.00 in the case in satisfaction thereof, and the above captioned matter is DISMISSED.


Virgil E. Vail
Administrative Law Judge

Distribution:

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(Certified Mail)

Mr. R. G. Tuttle, Corporate Director, Ross Island Sand & Gravel Company, 4315 S. E. McLoughlin Boulevard, P.O. Box 02219, Portland, Oregon 97202 (Certified Mail)

/blc

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCE
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 81-
Petitioner	:	A.C. No. 39-00055-0
	:	
v.	:	Homestake Mine
	:	
JAMES L. MERCHEN,	:	
Respondent	:	

DECISION

Appearances: J. Philip Smith, Esq., Office of the So
U.S. Department of Labor, Arlington, Vi
for Petitioner;
Robert A. Amundson, Esq., Amundson & Fu
Lead, South Dakota,
for Respondent.

Before: Judge Morris

The Secretary of Labor of the United States, the
charged with the statutory duty of enforcing the Fede
Safety and Health Act of 1977, 30 U.S.C. § 801 et seq
charges James L. Merchen with violating Section 110(c)
Act.

Section 110(c), now codified at 30 U.S.C. § 820(
provides, in part, as follows:

Whenever a corporate operator violates a mand
health or safety standard ... any director, o
or agent of such corporation who knowingly au
ordered, or carried out such violation ... sh
subject to the same civil penalties, fine, an
prisonment that may be imposed upon a person
sections (a) and (d).

After notice to the parties a hearing on the mer
in Lead, South Dakota on September 28, 1983.

The parties filed post trial briefs.

The issues are whether respondent violated the Act, and, what penalty is appropriate.

Stipulations

The parties stipulated that Homestake Mining Company was cited for violating 30 C.F.R. 57.6-107.¹/ Further, Homestake Mining Company did not contest the citation and paid the penalty. In addition, it was agreed that this case arises from the same incident (Transcript at page 48).

Summary of the Evidence

MSHA witnesses included William Donely, Rick Tinnell, Dalton Tinnell, Wayne Lundstrom and Richard Fischer.

MSHA's evidence shows that Homestake Mining Company, a corporation, mines gold that is shipped in interstate commerce (Tr. 7, 8; Exhibit P1).

On the day shift of January 24, 1980 miners had drilled 2 holes to a depth of 10 feet in a drift round. The following night shift included miners Rick Tinnell and his partner, Ward Sperry. Tinnell and Sperry drilled 10 to 12 more holes and blasted the round. When they inspected at the face they saw two misfired holes (Tr. 15; P3).

Rick Tinnell discussed the misfires with James Merchen, his supervisor, who was serving as the acting boss of the night shift. Merchen told them to fire the holes. At the end of the night shift Sperry didn't explode the misfires because he could not locate any powder (Tr. 8, 116). Tinnell was unsuccessful in relasting and washing out the explosives (Tr. 41, 66-67). The day shift was advised of the condition (Tr. 16).

When the miners returned the next night they found the day shift had drilled two holes, cut a "V", and blasted. But the misfires remained (Tr. 16). Merchen suggested Tinnell and Sperry fire out the misfires (Tr. 16).

Merchen further told the miners to drill two holes parallel to the misfired holes. He pointed to the area where he wanted the holes drilled. The area was four to six inches from the misfired holes (Tr. 17, 38). Tinnell and Sperry both thought

The standard provides:

that drilling this close was unsafe. They discussed it with Merchen. Tinnell suggested the use of a remote drill but refused to use this procedure (Tr. 18, 39, 40).

Rick Tinnell had never been instructed to drill that close to misfired holes. He felt it was dangerous because the drill could wander and hit the cap (Tr. 75, 77).

Following Merchen's instructions Tinnell drilled two holes approximately 2 1/2 feet deep. The holes were loaded and This eliminated the misfired holes (Tr. 17, 18).

At the end of the shift Tinnell and Sperry filled out time slips for 4 hours at the contract rate and 4 hours at day's pay rate (Tr. 62). The miners refused Merchen's request to change the time slips to 8 hours contract rate (Tr. 62).

Dallas Tinnell, father of Rick Tinnell and the president of the local union, expressed the view that drilling even 12 inches from misfired holes can be dangerous. When collaring a new hole a new drill could jump and go into the previous hole (Tr. 86).

Homestake Mining Company's rules in its safety book specify precautions to be taken when miners drill into misfired holes (Tr. 88-92; Exhibit P7).

Richard Fischer, MSHA's expert, stated it was a violation of 30 C.F.R. 57.6-107 to drill within 12 inches of two misfired holes (Tr. 100-107; P9). A definite danger of intersecting prior holes existed. Merchen should also have used a marker (Tr. 108, 111). A fatality could result if the one and a half pounds of explosives were ignited (Tr. 112).

Respondent's witnesses were James Merchen, Audrey Merchen and Joel Waterland.

On January 24, 1980 James Merchen was the relief shift supervisor supervising 15 miners (Tr. 124).

Merchen saw the misfires in the center of the round (Tr. 126). He told Sperry to blast them but the following day the holes remained (Tr. 127). Unsuccessful efforts to remove misfires included plastering, blasting, and washing them. The prior shift had cut a "V" in an effort to remove the misfires.

Merchen told Tinnell and Sperry to drill two holes 10

At the end of the shift a heated discussion took place between Merchen, Tinnell and Sperry about the pay for the shift. The miners refused to change their daily reports. A grievance was filed over this issue (Tr. 133, 134). There was no discussion about blasting the misfires when the three men argued over the daily reports (Tr. 134).

Merchen was aware of MSHA's regulations. He didn't knowingly tell the miners to violate them (Tr. 137).

Merchen, financially "poor", now earns approximately \$10 per month from Homestake Mining Company. He has a partnership in the mine but it is "in the red" (Tr. 135, 136, 146).

Dorey Merchen, respondent's sister-in-law, indicated that sometime after this incident Ricky Tinnell said he "got at" Merchen (Tr. 163, 165).

Del Waterland, an expert witness for respondent and a former mine employee, indicated that Merchen did all he could under the circumstances. The wires had been checked and the cap was supposed to be dead. The miners were unsuccessful in washing out the fire, in plaster blasting it, in "V" cutting it (Tr. 147, 148, 158). In Waterland's opinion no violation of the regulations occurred. If you drill straight into the face two feet from a misfire the wall will not break when it is exploded (Tr. 151-153, 156).

Discussion

The Commission has ruled that the proper legal inquiry for the purpose of determining corporate agent liability under Section 110(c) is whether the corporate agent "knew or had reason to know" of the violative condition. Secretary v. Kenny, 3 FMSHRC 8, 16 (January, 1981), aff'd, 689 F. 2d 623 (CA-10, 1982), cert. denied, 77 L.Ed. 2d (1983). There the Commission held:

If a person in a position to protect safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute.

The facts here establish that Merchen was the act boss. The two misfires were brought to his attention. "directed" Tinnell and Sperry, relatively inexperienced to drill parallel to the misfires. By his own admission drilling was to be within 10 to 12 inches to each side of misfires (Tr. 128, 129).

The regulation, 30 C.F.R. § 57.6-107, prohibits drilling where there is a "danger of intersecting a charged or misfired hole." The danger is especially present here because of the shattered area behind the face. Merchen relies on his instruction to the miners to drill parallel to the holes since the previous shift had drilled 25 of the 35 or 36 holes. Merchen would have no way of knowing the angle of any holes drilled by the previous shift.

Merchen knew of MSHA's regulation and there was a danger that Tinnell and Sperry could intersect the misfired holes.

A conflict exists in the testimony of MSHA's expert, Fischer, and respondent's witness Joel Waterland. I credit Fischer's testimony. He has a greater degree of experience than Waterland (Tr. 102, Exhibit P9). In addition, MSHA's rules support Fischer's testimony. The rules have the following relevant directives concerning "Drilling":

1. Ground must be closely examined before drilling to prevent drilling into a "misfired hole" (a hole with all or part of its explosive charge left in place which might explode and kill the driller and other workmen).

A "missed hole" found in a working place should be handled as follows:

- (a) If possible put in a new primer and blast the hole before proceeding with any other work until it can be blasted at the end of the shift.
- (b) If this cannot be done, wash the explosives out of the hole with a stream of water.
- (c) If neither of the above procedures is possible nor practical, mark the hole plainly with chalk or crayon and advise your boss of its location. The miner may then proceed under the following restrictions:
 - (i) In stopes, do not drill within five feet of the "missed hole."
 - (ii) In drifts, crosscuts or raises, comply with the following restrictions:

ing and blasting another hole at an angle to it. In
such a case, the collar of the new hole should be at
least two feet from the collar of the "missed hole.
The hole should be collared manually, then drilled
out by a drill with an automatic feed. Then the
driller will retire from the face and turn the drill
off from the airline valve located at the hose con-
nection to the air pipeline, or from a valve still
further back in the airline if the pipeline end is
too close to the face.

Emphasis added, Exhibit P7, pages 71-72.

The most restrictive circumstances in Homestake's safety rules require drilling at least two feet from the misfired hole. Merchen directed the drilling, by his own admission, at a point 0 to 12 inches from the misfires (Tr. 128, 129).

In his post trial brief respondent raises several issues. He initially asserts MSHA, with this inexplicit regulation, must prove the holes were drilled in a location where there was a danger of intersecting a charged or misfired hole.

The Secretary's expert witness establishes this evidence. He indicated that drilling within 12 inches is hazardous (Tr. 107). It was hard to determine how much the drill might wander but the danger is definite, in part, due to the underlying fracture (Tr. 108).

Respondent's post trial brief further asserts that this case is a classic example of a shotgun approach to "get even" with a supervisor on the part of a miner and his father's union (Brief page 14). I am not persuaded by this argument. There is such a paucity of evidence on the issue that it would be totally speculative to rest a decision on that facet of the case. Further, I do not find there was such motivation on the part of Rick Tinney and Sperry. If there was such a motivation it would surely have been mentioned when the three men had a "heated argument" about the pay for the shift.

A good portion of respondent's brief must be denominated as an assertion that 30 C.F.R. § 57.6-107 is unconstitutionally vague.

I agree this standard is not detailed but the Commission has previously observed, in a similar context, that "many standards must be 'simple and brief in order to be broadly adaptable to varied circumstances.'" Alabama Bay-Products Corp. v. FMSHPC

the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable law. See, e.g. Voegele Co., Inc. v. OSHRC, 625 F. 2d 1075, 1980). By applying this test to the facts of this case, process problems stemming from the respondent's asserted notice are avoided. Cf, United States Steel Corporation v. FMSHRC 3, (1983).

For the above reasons the Secretary's petition affirming the violation of Section 110(c) of the Act should be affirmed.

CIVIL PENALTY

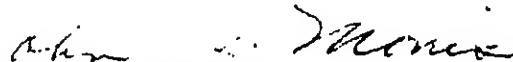
The Secretary proposes a civil penalty of \$500 against the respondent for this violation. The Secretary's narrative findings for a special assessment do not consider respondent's history nor his financial status.

Considering the statutory criteria, 30 U.S.C. 820, I believe a civil penalty of \$250 is appropriate for this violation.

Based on the foregoing findings of fact and conclusions of law stated herein I enter the following:

ORDER

1. Petitioner's petition for assessment of a civil penalty against respondent James L. Merchen is affirmed.
2. A civil penalty of \$250 is assessed for the respondent's violation.


John J. Morris
Administrative Law Judge

Distribution:

J. Philip Smith, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, Virginia
(Certified Mail)

Robert A. Amundson, Esq., Amundson & Fuller, 215 West
Box 875, Lead, South Dakota 57754 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

2 SKYLINE, 10th FLOOR

5203 LEESBURG PIKE

FALLS CHURCH, VIRGINIA 22041

AUG 15 1984

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINES SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 81-163-DM
ON BEHALF OF	:	
COOLEY,	:	Michigan Division Quarry
Complainant	:	
v.	:	
	:	
AWA SILICA COMPANY,	:	
Respondent	:	

ORDER


On March 30, 1984, the Commission issued its decision in this matter reaffirming my decision that the complainant, Cooley, was discriminated against in violation of section 10(c) of the Federal Mine Safety and Health Act of 1977. However, the Commission vacated my findings concerning the back pay and other benefits due the complainant, and remanded the case for a recomputation of the amount due the complainant.

In response to my Order of April 16, 1984, the parties have filed a stipulation concerning the amount due to the complainant. Upon review and consideration of this stipulation, I conclude and find that it complies with the Commission's previous order, and a copy of the stipulation is attached hereto and incorporated by reference. However, I take note of two typographical errors in the materials attached as part of the stipulation, and they are as follows:

Exhibit B - Back Pay 2nd Quarter 1980 - Should read \$2,168.08, rather than \$21.68.08.

Exhibit B - Back Pay 3rd Quarter 1980 \$3,542.98. The amount shown as \$3,542.98, rather than \$4,032.05, should be shown as the actual multiplier for each of the computations made for the periods reflected as the

order in this matter, and the respondent IS ORDERED to make payment to Mr. Cooley in the amounts shown, and to reinstate him as provided in my decision.


George A. Koutras
Administrative Law Judge

Attachment

Distribution:

David F. Wightman, Esq., Office of the Solicitor, U.S. Department of Labor, 230 South Dearborn St., 8th Floor, Chicago, IL 60604 (Certified Mail)

Frank X. Fortescue, Esq., Brown, McGlynn & Fortescue, 500 North Woodward, Suite 320, Bloomfield Hills, MI 48013 (Certified Mail)

UNITED STATES DEPARTMENT OF LABOR

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

DEPARTMENT OF LABOR,
MINE SAFETY AND HEALTH ADMINISTRATION

Respondent of John Cooley

v.

Plaintiff CA COMPANY

Docket No. LAKE 81-163 DM

STIPULATION OF PARTIES ON REMAND

On June 3, 1982, the parties, by their respective attorneys and, in accordance with the March 30, 1984 Decision of the Federal Mine Safety and Health Review Commission remanding this matter to Administrative Law Judge George Koutras for a reformulation of the remedial order, stipulated to the following stipulations.

Administrative Law Judge George Koutras' June 3, 1982 Decision ordered defendant to reinstate John Cooley with back pay from June 3, 1980.

John Cooley has not been reinstated.

least April 20, 1984. Pursuant to the collective bargainment between the Michigan Division of the Ottawa Silica Co. and Teamster's Local Union No. 283 (hereinafter Labor Agreement), a furlough of more than two years breaks the employee's seniority and terminates his right to recall with defendant.

5. For the period May 5, 1980 through April 19, 1982, Cooley's wages as a laborer would have totaled \$28,738.08.

6. For the period May 5, 1980 through April 19, 1982, Cooley's vacation pay would have totaled \$618.40.

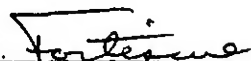
7. Pursuant to the Labor Agreement, for the period May 5, 1980 through April 19, 1982, defendant shall make pension contributions on behalf of John Cooley to the Central States Southeast and Southwest Areas Pension Fund.

8. For the period May 5, 1980 through April 19, 1982, the total of John Cooley's back wages listed in paragraphs 5 and 7 herein is \$29,356.48 and is broken down by calendar quarter in the attached Exhibit A.

9. Under the formula provided in Bailey v Arkansas-Louisiana & Weller, 3 MSHC 1152 (Dec. 1983), interest on the \$33,056.48 back wages through June 30, 1984 is \$13,226.45. The interest computations are contained in the attached Exhibit B.

aid until such time as the back wages and accumulated
aid in full.

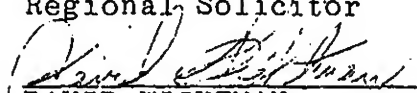
COMPANY


F. FORTESCUE, ESQ.
J. Fortescue & Fortescue
ward, Suite 320
Hills, MI. 48013

Respectfully submitted,

FRANCIS X. LILLY
Solicitor of Labor

JOHN H. SECARAS
Regional Solicitor


DAVID WIGHTMAN
Attorney

Attorneys for Raymond J. Donovan,
Secretary of Labor, United States
Department of Labor

1/1/81-3/31/81 3,742.72

4/1/81-6/30/81 3,801.20
3,801.20

7/1/81-9/30/81 3,859.68

16 hrs. x 7.31
\$116.96

10/1/81-12/31/81 4,072.48

1/1/82-3/31/82 3,075.84

4/1/82-6/30/82 833.04

56 hrs. x 8.01
\$448.56

TOTAL

\$28,738.08

\$618.40

\$2

EXHIBIT B

1st Quarter 81	2,168.08 x 90 days x .0003333	=	6
2nd Quarter 81	2,168.08 x 90 days x .0003333	=	6
3rd Quarter 81	2,168.08 x 90 days x .0003333	=	6
4th Quarter 81	2,168.08 x 90 days x .0003333	=	6
1st Quarter 82	2,168.08 x 90 days x .0005555	=	1
2nd Quarter 82	2,168.08 x 90 days x .0005555	=	1
3rd Quarter 82	2,168.08 x 90 days x .0005555	=	1

TOTAL

Back Pay 3rd Quarter 1980 3542.96

4th Quarter 80	4,032.05 x 91 days x .0003333	=	1
1st Quarter 81	4,032.05 x 90 days x .0003333	=	1
2nd Quarter 81	4,032.05 x 90 days x .0003333	=	1
3rd Quarter 81	4,032.05 x 90 days x .0003333	=	1
4th Quarter 81	4,032.05 x 90 days x .0003333	=	1
1st Quarter 82	4,032.05 x 90 days x .0005555	=	1
2nd Quarter 82	4,032.05 x 90 days x .0005555	=	1
3rd Quarter 82	4,032.05 x 90 days x .0005555	=	1

TOTAL

r 81	3,694.96 x 90 days x .0003333	=	110.83771
r 82	3,694.96 x 90 days x .0005555	=	184.72952
r 82	3,694.96 x 90 days x .0005555	=	184.72952
r 82	3,694.96 x 90 days x .0005555	=	184.72952

998.77

Back Pay 1st Quarter 1981 \$3,742.72

r 81	3,742.72 x 91 days x .0003333	=	113.51782
r 81	3,742.72 x 90 days x .0003333	=	112.27037
r 81	3,742.72 x 90 days x .0003333	=	112.27037
r 82	3,742.72 x 90 days x .0005555	=	187.11728
r 82	3,742.72 x 90 days x .0005555	=	187.11728
r 82	3,742.72 x 90 days x .0005555	=	187.11728

899.41

2nd Quarter 82 3,801.20 x 90 days x .0005555 =

3rd Quarter 82 3,801.20 x 90 days x .0005555 =

TOTAL

Back Pay 3rd Quarter 1981 \$3,976.6

4th Quarter 81 3,976.64 x 91 days x .0003333 =

1st Quarter 82 3,976.64 x 90 days x .0005555 =

2nd Quarter 82 3,976.64 x 90 days x .0005555 =

3rd Quarter 82 3,976.64 x 90 days x .0005555 =

TOTAL

Back Pay 4th Quarter 1981 \$4,072.4

1st Quarter 82 4,072.48 x 91 days x .0005555 =

2nd Quarter 82 4,072.48 x 90 days x .0005555 =

3rd Quarter 82 4,072.48 x 90 days x .0005555 =

TOTAL

Back Pay 2nd Quarter 1982 \$1,281.60

d Quarter 82 1,281.60 x 91 days x .0005555 = 64.78

Back Pay \$29,356.48

h Quarter 82	29,356.48 x 90 days x .0005555 =	1,467.6772
st Quarter 83	29,356.48 x 90 days x .0004444 =	1,174.1417
d Quarter 83	29,356.48 x 90 days x .0004444 =	1,174.1417
d Quarter 83	29,356.48 x 90 days x .0003055 =	807.1564
h Quarter 83	29,356.48 x 90 days x .0003055 =	807.1564
t Quarter 84	29,356.48 x 90 days x .0003055 =	807.1564
d Quarter 84	29,356.48 x 90 days x .0003055 =	807.1564

U.S. STEEL MINING CO., INC., :
Respondent :

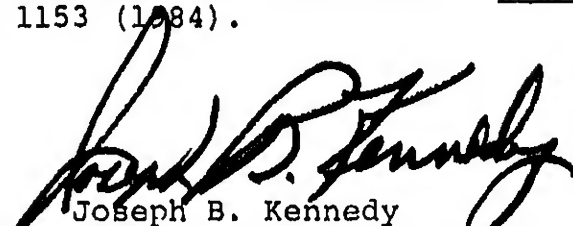
HOPE CD-83-18

UNITED MINE WORKERS OF :
AMERICA, :
Intervenors :

ORDER OF DISMISSAL

Before: Judge Kennedy

For good cause shown, it is ORDERED that complainant's motion to withdraw the captioned discrimination complaint be, and hereby is, GRANTED and the case DISMISSED. U.S. Steel Mining Co., Inc., 6 FMSHRC 1153 (1984).


Joseph B. Kennedy
Administrative Law Judge

Distribution:

Mr. Jerry L. Blackburn, P.O. Box 10, Wolf Pen, WV 24896
(Certified Mail)

Louise Q. Symons, Esq., U.S. Steel Mining Co., Inc., 600 Gr
St., Pittsburgh, PA 15230 (Certified Mail)

Mary Lu Jordan, Esq., UMWA, 900 15th St., NW, Washington, D
20005 (Certified Mail)

/ejp

v. : Moab Mill
:
ATLAS MINERALS, :
Respondent :

DECISION APPROVING SETTLEMENT

Appearances: James H. Barkley, Esq., Robert J. Lesnick, Esq.
Peggy Miller, Esq., Office of the Solicitor, U.
Department of Labor, Denver, Colorado,
for Petitioner;

James A. Holtkamp, Esq., and John A. Snow, Esq.
VanCott, Bagley, Cornwall & McCarthy, Salt Lake
City, Utah,
for Respondent.

Before: Judge Morris

This is a civil penalty proceeding initiated by the petitioner against the respondent in accordance with Section 110(a) of Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a). The civil penalty is for the alleged violation of mandatory safety standard promulgated pursuant to the Act.

At a hearing in Moab, Utah on August 23, 1984, in related cases the parties advised the judge that they had reached an amicable settlement. The parties now seek approval of their proposed settlement.

Citation 2008174 alleges a violation of 30 C.F.R. § 57.9-88(a). The citation proposed an original penalty of \$10,000. The parties now seek to amend the citation by changing its designation from "104-d-1" to "104-a." The parties agree that the original penalty should be assessed.

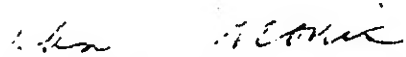
Discussion

In support of the motion petitioner states he agrees with the assessment and relies on the assessment made by his Office of Assessment in evaluating the statutory criteria for assessing the penalty.

2. The citation is amended to change the designation
"104-d-1" to "104-a."

3. Citation 2008174 and the penalty of \$300 are

4. Respondent is ordered to pay the sum of \$300
days of the date of this order.


John J. Morris
Administrative Law Judge

Distribution:

James H. Barkley, Esq., Robert J. Lesnick, Esq., and
Miller, Esq., Office of the Solicitor, U.S. Department
U.S. Department of Labor, 1585 Federal Building, 196
Street, Denver, Colorado 80294 (Certified Mail)

James A. Holtkamp, Esq., and John A. Snow, Esq., Van
Cornwall & McCarthy, 50 South Main, Suite 1600, Salt
Utah 84144 (Certified Mail)

/blc

v. : Hampton No. 3 Mine
: :
WESTMORELAND COAL COMPANY, :
Respondent :

DECISION

Appearances: Kevin C. McCormick, Esq., Office of the Solicitor
U. S. Department of Labor, Arlington, Virginia,
for Petitioner;
F. Thomas Rubenstein, Esq., Big Stone Gap, Virginia,
for Respondent.

Before: Judge Steffey

A hearing in the above-entitled proceeding was held on June 12, 1984, in Beckley, West Virginia, pursuant to section 105(d), 30 U.S.C. § 815(d), of the Federal Mine Safety and Health Act of 1977. At the conclusion of presentation of evidence by both parties, I rendered a bench decision.

Before the transcript of the hearing had been received, counsel for respondent filed on June 22, 1984, a motion for reconsideration of the bench decision. A copy of the motion for reconsideration was served on counsel for the Secretary of Labor. The Secretary's counsel filed on August 8, 1984, a letter in which he stated that he did not intend to submit a reply to respondent's motion for reconsideration.

The substance of my bench decision is first set forth below (Tr. 274-289). Thereafter, respondent's motion for reconsideration is denied for the reasons given.

This proceeding involves a petition for assessment of civil penalty, alleging a violation of 30 C.F.R. § 75.200 by Westmoreland Coal Company. The issues in a civil penalty case are whether the violation occurred and, if so, what civil penalty should be assessed, based on the six criteria set forth in section 110(i) of the Act.

Before I form a conclusion regarding the question of whether a violation occurred, I shall make some findings of fact which will be set forth in enumerated paragraphs.

2. When the inspector and Egnor were close to of the No. 3 entry, the inspector noticed that the curtain in the crosscut to the right of No. 3 entry. The inspector investigated the absence of the curtain and there was a hole on the right side at the face of the crosscut and he concluded that that made the need for installing the curtain unnecessary. But while he was examining the condition of the ventilation, he noticed that the crosscut had been developed for a distance which appeared to be greater than it should have been cut with a continuous-mining machine with the machine's operator having proceeded in by permanent supports.

3. The inspector determined that a measurement of the area should be made in order for him to ascertain whether the operator of the continuous-mining machine had proceeded in by permanent supports. Therefore, he tied a hammer to a tape measuring device that he carried with him and passed the hammer through the hole at the end of the crosscut. He asked Egnor to go to the No. 4 entry, into which the crosscut extended, and retrieve the hammer, and thereby enable the inspector to make an accurate measurement. Egnor was cautioned to make sure he did not go out from under permanent supports.

4. Egnor proceeded out by the No. 3 entry through the crosscut out by the one in which the measurement was made. He proceeded into the No. 4 entry and came to the place where the hole had been made near the face of the No. 4 entry. He held the tape and it was determined that the distance from the last permanent support in the crosscut through the crosscut to the end of the crosscut was 23 feet, but the inspector could not get a measurement only to the most in by place in the crosscut from which coal had been extracted by the continuous-mining machine. Therefore, he withdrew the tape after Egnor untied it from the hammer, and when the tape came out of the hole and fell on the mine floor, the inspector made the determination that the distance from the face of the crosscut to the second roof bolt from the right of the crosscut was 23 feet. The inspector believed that the second bolt from the right in the crosscut was in line with the other three bolts in the same line of bolts and therefore did not take additional measurements.

The last open crosscut between No. 3 entry and No. 4 entry has been mined 22 feet deep. From cutter head to the controls measures 19 1/2 feet, putting the controls of the miner inby the last row of permanent support. This crosscut was mined on 2nd shift, 9/15/82. The Onshift and Daily Report Book indicates Roger McMicken as section foreman on said shift. See page 19, line 1 of approved plan or Drawing 1, page 17 of approved plan.

6. Raymond Watts was the operator of the continuous-mining machine on the second shift, that is, 4:00 p.m. to midnight on September 15, 1982, when the condition described by the inspector occurred. Watts had previously been working in 1979 when a roof fall occurred in the Hampton No. 3 Mine, at which time two miners were killed and Watts narrowly escaped being killed himself. The occurrence was so unsettling that Watts was unable to work for approximately 14 months. Therefore, he testified in this proceeding that it was not his practice or intention ever to do his job in a manner which would expose him or anyone else to possible injury. He testified that when he advanced the continuous-mining machine into the crosscut here at issue, he found that it was off center and that it was necessary for him to move his continuous-mining machine at an angle to the right rib in order to straighten the crosscut. He stated that it was his practice to look through a screen at the front of the canopy under which he sits and that when he saw the last roof bolt, or the roof bolt in the last row of permanent supports come into view in that screen, that he stopped running the continuous-mining machine because that way he knew he would not go inby the last row of supports. He testified that that was what he recalled having done on the night of September 15. He did recall that when he finished cleaning up the entry and backed his continuous-mining machine out of the crosscut he did see a hole in the face of the crosscut.

7. When Watts came to work on the following day he learned from the superintendent of the mine that a withdrawal order had been written on the day shift because of his having advanced the controls of the miner inby the last row of permanent supports.

has no specific recollection of whether the mining inby the last row of permanent supports, but he said of his duties was to help the operator of the continuous-mining machine in order to see that he did not go inby the supports and, so far as he could recall, Watts did the last row of permanent supports. He also recalled that there was a hole at the face of the crosscut, but he did not go in until after Watts had cleaned up the crosscut and he had pulled out the continuous-mining machine.

9. Roger McMicken was the section foreman on September 15, 1982. He testified that he saw a face of the crosscut when he was making his last check of the section, but he did not notice anything unusual other than the face. He was not aware that a charge had been made against the section going inby the last row of permanent supports until the morning for work the following day and also was advised by the superintendent that the withdrawal order had been withdrawn. One of the actions McMicken made was to go into the section to measure the distance between the last row of bolts of the crosscut and his measurements showed that there was 19 feet from all of the bolts, except the first row of bolts from the right rib. He found the distance from the first bolt from the right rib to the face to be 22 feet, but the distance measured by the inspector, but he said that he thought that the second bolt was in line with the other bolts. He believed it was outby the others by a considerable distance. That misalignment, together with the hole at the face of the crosscut, in McMicken's opinion, accounted for the discrepancy in that particular measurement was 22 feet. The distance from the first bolt from the right rib to the face was measured by McMicken as being 20 feet (Exh. B).

10. Richard Sparks was the operator of a scoop shift on September 16, 1982. He testified that he was using the scoop to clean up the No. 4 entry and that the scoop was engaged at the time that Egnor came into the No. 4 entry in order to go up to the face of the No. 4 entry in order to check the measurement with the inspector in the measurement which the inspector made when issuing his withdrawal order. Sparks claims that he put his hand on the rib and reached clear through the end of the crosscut in order to retrieve something,

No. 4 entry and only observed him, he says, after he was already situated at the hole on the left side of the No. 4 entry. Sparks accounted for his failure to see Egnor walk past him by stating that he has to move back and forth in the entry in his process of cleaning with the scoop. Egnor testified on rebuttal that no one was in the No. 4 entry when he went there to assist the inspector and that he would have remembered it if anyone had been running a scoop because he would have had to have dragged down the scoop operator in order to go past him.

11. Jim Kiser is the manager of Westmoreland's health and safety program and he, among other duties, conducts accident investigations of all serious violations which are alleged by any of MSHA's inspectors. Kiser considered the withdrawal order here issued to be a serious one because it was written under the unwarrantable-failure provisions of the Act and is, therefore, considered to be more serious than an ordinary citation might be. His investigation of the matter took a couple of weeks to complete and resulted in a conclusion by Kiser that Westmoreland's personnel were not at fault in the occurrence and consequently did not recommend that any of the people involved be disciplined, although it is Westmoreland's practice to discipline people who do violate the mandatory safety standards if the investigation shows that violations occurred.

Counsel for the Secretary and Westmoreland made concluding arguments and they both stressed the fact that there are credibility problems involved in the testimony.

The Secretary's counsel emphasized the fact that the inspector has no particular reason to cite a violation he has not actually seen, that the chairman of the safety committee has no reason to be biased against the company for which he works, and that their testimony should be given greater weight than that of Westmoreland's witnesses who were obviously aware of the fact that they might receive some discipline if they were considered to be at fault in the issuance of Order No. 2037676.

Westmoreland's counsel stressed the fact that Watts is an individual who has an excellent reputation in the company and the fact that the section foreman has not previously known him.

such a fashion in making the measurement. I agree with Westmoreland's counsel that the measurement was made seems to have left something in the way of safety and I hope that similar acts cur in the future so that one person is perhaps en while proving that someone else was in a hazardous Even Egnor admitted in his testimony that once a h in a coal face, which is only about a foot thick, al coal may slough off and that it's not a very sa be. Of course, both Egnor and the inspector denie was at anytime in any danger.

One of the duties which a judge has is making determinations and one of the ways a judge does th on the demeanor of the witnesses as well as the co their testimony. Based on the demeanor of the wit this case, I believe that the inspector and Egnor on credibility. I found a number of questions ans moreland's witnesses with qualifications that they sure of the facts and with the assertion that it h most 2 years since this matter occurred. Even the man stated that he thinks that the crucial bolt fr measurements were made was out of line.

I believe that the credible evidence requires that there was a distance of 22 feet from the face cut back to the last row of permanent supports. S in this proceeding shows that the distance from th continuous-mining machine back to the controls is then necessarily the continuous-mining machine ope have had to go inby the last row of bolts in order a cut of 22 feet.

I am taking into consideration the fact that alleged that the continuous-mining machine operato to straighten the crosscut by cutting at an angle, also taking into consideration the fact that Egnor 11 years of experience as an operator of a continu machine and I am relying upon his and the inspecto sions and certainty that there was no evidence to crosscut had been cut at an angle so as to confirm rate Watts' testimony to that effect.

ion was cited. Those stipulations take care of three of the six criteria.

The fourth one is the history of previous violations. Exhibit No. 7 is a computer printout which indicates that Westmoreland, at the Hampton No. 3 Mine here involved, has paid penalties for 29 violations of section 75.200 in the 24 months preceding the occurrence of the violation here involved. Counsel for Westmoreland pointed out that those violations were relatively minor in that they were alleged in citations issued under section 104(a) of the Act, except for one imminent-danger order and one unwarrantable-failure order. He also said that a check had been made of those 29 previous violations and that one of them involved an allegation that anyone had proceeded without permanent roof support.

It appears to me that 29 previous violations in a 24-month period is a large number of violations and one reason I am troubled by that many is that when the Act was amended in 1977 one of the things that concerned Congress in its discussions was the need to modify the Act to make it stronger in its provisions. As that in the Scotia mine the company had previously violated the ventilation provisions and yet the company had not been assessed increasingly large penalties based on those repeated violations. Congress thought that the Act was not being properly administered, or each succeeding violation would have received a higher civil penalty than the one before it. 1/

I am inclined to temper my consideration in this instance because normally a judge does not get any information at all about the type of previous violations; he simply is presented with a number and he has no way to get a perception of the kind of violation involved. In this proceeding, however, there are statements that a check has been made of the previous violations and that they do not seem to be serious, or at least there is not a previous violation of having gone beyond permanent support. For that reason, I shall not make a severe increase in the penalty under the criterion of history of previous

/ S. REP. NO. 95-181, 95th Cong. 1st Sess. 42-43 (1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 630-631 (1978).

violation did occur at all. Westmoreland's counsel on the other hand, has taken the very same set of circumstances and argued that the company should not be held guilty of a high degree of negligence because it has made strenuous efforts to acquaint its personnel with the control conditions and that it has made every effort it can make to get its miners to proceed in a safe and proper fashion.

There is a considerable body of testimony showing that Watts was a person who was safety minded and I believe in this instance that he did intend to mine in a safe manner. He did intend to stop before going in by the last row of supports. It is possible for anyone to make a mistake and believe that Watts did inadvertently cut farther than he intended. For that reason, and the fact that there is testimony showing that Westmoreland is trying to operate a safe mine and to make its employees safety conscious, I believe that a very small degree of negligence should be attributed to the management in this case.

* I might point out that there are precedents for finding here as to negligence. In Southern Ohio Coal Co. v. FMSHRC 1459 (1982), the Commission held that the operator is not liable for negligence for the acts of the rank and file miner when it comes to assessing a civil penalty, but the operator is liable for the acts of the rank and file miner when it comes to the finding of a violation, because under the Act, the operator is liable without fault for violations that occur in its mine. U. S. Steel Corp., 1 FMSHRC 1300. The testimony shows that Westmoreland has tried to train its miners in proper safety procedures and all witnesses who worked for the company so testified. For the aforesaid reasons, I am not assessing any portion of the penalty under the criterion of negligence.

The final criterion to be evaluated is gravity. There is a great deal of testimony by the roof-control specialist, Inspector Eddie White, and by the inspector who wrote the order to the effect that a large number of fatalities

involved here and when such roofs fall, they are inclined to break up so that portions of rock can fall in on the operator, even though he is protected by a canopy because the canopies do not have sides on them to prevent such encroachments. Also the helper to the continuous-mining-machine operator testified that he works close to the operator and that makes him vulnerable to injury, if a roof fall should occur, because the fall will not necessarily terminate right at the canopy of the operator who is running the continuous-mining machine.

The discussion above shows that the violation must be rated as being very serious under the criterion of gravity. Based on that criterion, and the fact that a large operator is involved, I believe that the gravity of the violation warrants a penalty of \$800. When the \$200 portion of the penalty assessed under the criterion of history of previous violations is added, a total penalty of \$1,000 will be assessed, as hereinafter ordered.

THE MOTION FOR RECONSIDERATION

Occurrence of a Violation

As indicated on page 1 of this decision, counsel for Westmoreland filed on June 22, 1984, a motion for reconsideration of the bench decision rendered at the conclusion of the hearing. A judge's bench decision is not a final decision until it has been issued after receipt of the transcript and given a date by the Commission's Executive Director in accordance with 29 C.F.R. § 2700.65. Therefore, Westmoreland's counsel is not precluded under the Commission's procedural rules from filing a motion for reconsideration of a bench decision. Additionally, in C.C.C.-Pompey Coal Co., Inc., 2 FMSHRC 1195 (1980), the Commission held that a judge is obligated to reconsider any holdings made in a bench decision if, during the interim between the rendering of the bench decision and its issuance in final form, the Commission issues a decision establishing a precedent which conflicts with the ruling made by the judge in his bench decision. The ruling in the Pompey case is applicable in evaluating Westmoreland's motion for reconsideration because the Commission issued a decision in United States Steel Corp., 6 FMSHRC 1423 (1984), after I had rendered the bench decision in this proceeding. In the U. S. Steel decision, the

that the hole in the face of the crosscut was caused by "popping out" of coal as a result of the pressure exerted by the small amount of coal left standing between the crosscut and the No. 4 entry (Exh. 4). Westmoreland claims that the distance from the last permanent support to the face of the crosscut was 22 feet, as measured by the inspector. Westmoreland claims that the alleged distance of 2 inches from the face of the crosscut to the right rib, which the operator of the continuous-mining machine measured, was beyond permanent supports was accounted for by Westmoreland's witnesses who said that the second roof bolt from the right rib was out of line with the other roof bolts by about 18 inches and that about 18 inches of coal had popped out of the face of the crosscut.

Exhibit 5 shows that if one measures obliquely from the left side of the cutterhead on the continuous-mining machine to the operator's controls located on the right side of the machine, the distance is 21 feet 10 inches, instead of the distance of 22 feet 6 inches obtained by the inspector who measured directly from the right cutterhead to the operator's controls while standing on the right side of the continuous-mining machine. Westmoreland points out that the operator of the continuous-mining machine testified that the entry was off center and that he was standing at an angle to bring the crosscut back into alignment. Westmoreland argues from the aforesaid facts that the operator of the miner was 21 feet 10 inches from the face because of the angle at which the crosscut was mined. That contentions support a conclusion that the operator, at most, was 2 inches in by the last permanent support (22' minus 20' = 2').

Westmoreland then points out that the hole in the face of the crosscut was caused by popping or crumbling of the coal. The crumbling effect, according to Westmoreland, made an indentation in the face of 18 inches. That indentation, should also be subtracted from the inspector's measurement of 22 feet because the head of the continuous-mining machine did not cut that 18-inch indentation. If one subtracts 18 inches indentation from the 2-inch distance that the operator measured, it will be readily seen that the distance from the face of the miner, instead of being 2 inches in by the second roof bolt from the right rib, was actually 16 inches out by the second roof bolt.

from the cutterhead to the controls and the 18-inch indentation in the face of the crosscut. Westmoreland's argument as to the cutting of the crosscut at an angle is controverted, however, by the testimony of the inspector and the chairman of the safety committee who stated unequivocally that cutting at the oblique angle that would be necessary to bring the 21-foot 10-inch measurement into play would have resulted in the cutting of a large place shaped like a piece of pie in the right rib. Both of the witnesses testified unequivocally that the right rib was smooth and free of any indications showing that the crosscut had been cut at an angle (Tr. 26; 52-53; 72-73; 74-75).

Exhibit 5 is a diagram of the continuous-mining machine. The diagram shows that the continuous-mining machine is 10 feet 10 inches wide and 23 feet 4 inches long. It was operated in a crosscut whose total width was 20 feet. An offset had been cut in the face on the right side. It is impossible for a machine 23 feet 4 inches long and almost 11 feet wide to be turned in a 20-foot entry so as to bring the oblique measurement of 21 feet 10 inches into play because the rear of the machine will come into contact with the left rib and prevent the machine from being turned at an acute angle. Additionally, it must be recognized that the helper to the operator of the continuous-mining machine testified that the ventilation curtain was in place both at the time they were mining and at the time they were cleaning up the crosscut (Tr. 187; 193-194). The ventilation curtain was 4 feet from the right rib (Tr. 193). The curtain therefore reduced the maneuverability of the continuous-mining machine by reducing the width of the entry to 16 feet. Moreover, exhibit 5 shows that the continuous-mining machine has a loading attachment on its rear end which is 9 feet 6 inches long and the helper further testified that he was involved in keeping the shuttlecars from becoming entangled in the continuous-mining machine's cable. While the loading apparatus on the continuous-mining machine will swing to the right or left to provide some flexibility in the way the continuous-mining machine is used, the fact remains that the machine's ability to turn at a dramatic angle was further reduced by the fact that it was delivering coal into shuttlecars.

22' 0" = distance from second roof bolt from right rib to face of crosscut (Exh. 4).

-21' 10" = distance from left cutterhead to controls of machine (Exh. 5).

2" = distance operator was inby second roof bolt from right rib.

18" = indentation in the face caused by "pop off" of coal (which further reduces the inspector's 22-foot measurement).

- 2" = distance which operator would have been from second roof bolt if he were 21' 10" from face.

- 16" = distance operator would have been outby second roof bolt if indentation accounted for 18 inches of inspector's 22-foot measurement.

+24" = distance second roof bolt was out of line with other roof bolts in last row of permanent supports.

- 40" = distance operator would have been outby last row of permanent supports if all Westmoreland's contentions are applied to reduce the inspector's 22-foot measurement.

The inspector testified that he went into the crosscut to determine why no curtain had been erected in the crosscut. When he saw the hole in the face, he recognized that air was coming into the No. 4 entry, which was the return entry, and that there was the need to have a curtain installed, but then the inspector's attention was attracted to the fact that the crosscut was not lined beyond permanent support in violation of the roof plan (Tr. 17). If the operator of the continuous-miner had stopped cutting coal when the controls of the machine were 40 inches outby the last row of permanent supports, there was a likelihood that the inspector's attention would have been directed to the depth of the last cut of coal which had been moved from the crosscut because the operator of the machine could not have been close enough to the face for the machine to have been nearer to the face than the 22-inch distance from the right cutterhead to the machine controls (Exhs. 4 and 5).

ining machine to have cut 20 feet inby the first roof bolt from the right rib without going at least 6 inches inby that roof bolt because the continuous-mining machine could not possibly have cut the extreme right side of the face to a depth of 20 feet without having the continuous-mining machine almost squarely against the face as claimed by MSHA's witnesses (Tr. 13; 72).

Westmoreland's contentions about nonoccurrence of the violation are further flawed by the lack of certainty shown in its witnesses' testimony. Raymond Watts was the operator of the continuous-mining machine on the night of September 15, 1982. Watts is classified as the helper to the operator of the continuous-mining machine (Tr. 141), but on the night of September 15, 1982, the regular operator did not report for work because of illness in his family (Tr. 157). Watts' helper was Roger Bias who was not familiar with the Joy miner which was being used at that time (Tr. 159). It is ordinary practice for the regular operator to make the first cut of the shift and for the helper to make the second cut. Then they generally alternate in that fashion throughout the shift, but Bias' inexperience prevented that sort of switching in assignments with the result that Watts made all of the cuts of coal which were mined on the evening shift of September 15 (Tr. 157-159).

Watts' testimony will not support many findings because he was not certain about his actions on September 15. He was only able to say that he "thinks" the bolts in the last row of permanent supports were out of line (Tr. 154). Watts agreed that the right side of the crosscut was definitely cut more deeply into the face than the left side, that he was the one who made both cuts, and that he believed the right side was cut from 10 inches to a foot deeper than the left side (Tr. 155). Watts also claimed that he was watching the curtain on the roof bolt closest to the right rib and that he did not go beyond that curtain (Tr. 145), but the section foreman found that it was 20 feet from that bolt to the face of the crosscut (Tr. 204). As indicated above, Watts could not have cut the extreme right corner of the crosscut to a depth of 20 feet without going inby that bolt by at least 6 inches. Despite Watts' contention that he had not gone beyond the last row of permanent supports, he did not bother to measure the distance to the face after the crosscut had been bolted (Tr. 179).

(Tr. 186; 191). Bias did not recall which bolts he was watching when Watts made the cut on the right side, but he said that he ought to have been watching the two bolts nearest to the right rib (Tr. 190). Bias also testified that they did not take down the curtain before cleaning up the crosscut and that the curtain was still up when he left the section between 11:15 and 11:30 p.m. (Tr. 193).

The measurements on which Westmoreland relies were made by Roger McMicken, the section foreman who was on duty when the disputed deep cut was mined. He testified that he saw the hole in the crosscut when he made his last check of the face area on September 15, 1982. He saw nothing otherwise unusual about the way the crosscut had been mined (Tr. 199). His measurements were made the next night after the crosscut had been fully bolted, but he knew which bolt to use in his measurement because it had been marked (Tr. 201). Although he, like the inspector, obtained a 22-foot measurement from the second bolt from the right rib to the face, he said that one of the reasons the distance measured that much was that he had placed the end of the tapeline into the 18-inch indentation caused by the "popping" out of the hole in the face (Tr. 201). Yet he could not recall whether the hole was in line with the second bolt, or how far off the right rib the hole was, or whether the hole was on the left or right side of the cut (Tr. 203). After giving the distances which he measured, he said that he "believed" those were the measurements he obtained (Tr. 205). As to the 20-foot measurement from the first roof bolt from the right rib to the face, he testified that it was "maybe twenty foot" (Tr. 204). The aforesaid equivocations were made during his direct testimony.

On cross-examination, McMicken stated that the curtain was not up at 11 p.m. when he checked the crosscut (Tr. 208), but, as noted above, Bias stated that the curtain was still up when they cleaned up the crosscut. As to the offset in the face of the crosscut, which Watts said existed, McMicken testified that he could not recall whether the offset existed or not, but he would not say that it did not exist or that he had failed to see it (Tr. 211). Although McMicken believed that "more than likely someone was holding the tapeline" (Tr. 212) when he made his measurements, he could not recall who assisted him in making the

if any, or what was done by the roof-bolting machine's operator to compensate for having installed a roof bolt which was from 1 to 2 feet out of alignment (Tr. 217).

Although I noted in finding No. 10 of my bench decision that Egnor had gone to the face of the No. 4 entry where it could have been dangerous for him to go in order to assist the inspector in making his measurement, Westmoreland's claim that Egnor reached into the hole in order to obtain the inspector's hammer is based on the incredible testimony of Richard Sparks who alleges that he was operating a scoop in the No. 4 entry at the time Egnor came into the No. 4 entry. While Sparks claims to have seen Egnor reach into the hole for the purpose of getting something on the other side of the entry, Sparks' testimony is filled with unexplained gaps and inconsistencies. He first said that Egnor placed his hand on the rib and reached through the hole, but thereafter he was unable to state for sure which hand Egnor used to reach into the hole (Tr. 221; 225). He first said that he did not ask Egnor why he was doing such an unsafe act and then stated that he could not recall whether he asked Egnor anything about the hazardous act he had committed (Tr. 221; 226). Although Sparks was busy piling up coal at the very place where Egnor was said to have reached through the hole, Sparks testified that he did not see Egnor walk past him on his way to the face (Tr. 229-230). Although Sparks had an obvious interest in what happened in the mine, he professed not to be interested enough in what Egnor was doing to know what he obtained when he reached through the crosscut or to notice whether Egnor was carrying a hammer when he walked past him after he had reached through the hole to get something (Tr. 225; 230). Even though Sparks did not know when Egnor had come to the face of the No. 4 entry at the time Sparks claims to have seen him, Sparks claims that he asked someone later in the shift to find out what was going on, but cannot remember who it was that he asked (Tr. 227).

Additionally, Sparks claimed that Jake Henry, the helper to the continuous-mining machine operator on the day shift, was in the crosscut at the time the inspector made his measurement and Sparks stated that Henry told him it took the inspector two or three throws to get the hammer through the hole in the face of the crosscut (Tr. 223). Sparks then apparently realized that if Henry had seen the hammer go through the hole, it would

in making his measurement. Egnor additionally would have been necessary for him to have flagged so that he could proceed by him to the face of (259-260). Sparks stated that he did not see him while he was operating the scoop because he went back and forth in the entry (Tr. 228). I find no statement that he would have remembered flagging the scoop's operator, if anyone had been operating. This is more convincing and more credible than Sparks' statement that he was in the No. 4 entry and observed Egnor going to the hole to obtain an unknown object.

I believe that the discussion above shows that the inspector correctly concluded that the continuous-mining machine proceeded in by permit when he mined the second cut on the right side on September 15, 1982. Having reexamined all the evidence in light of Westmoreland's motion for reconsideration, I conclude that my bench decision correctly found that the violation of section 75.200 occurred as alleged in Order dated September 16, 1982.

Assessment of Penalty

Westmoreland's motion for reconsideration states that the violation was associated with a low degree of negligence for the purpose of arguing that a penalty was excessive in circumstances where management made a sincere and concerted effort to teach mining practices. Westmoreland claims that no one should suggest anything that Westmoreland could have done to prevent the instant violation. If there is any part of my decision which is incorrect, it is my conclusion that the penalty should be assessed under the criterion of negligence. I shall hereinafter explain in detail how I assess any portion of the penalty under negligence.

There is evidence in the record to support a finding of a greater degree of negligence than I found in my decision if I had thought it would be fair to Westmoreland to consider such evidence. Inspector Baisden, for example,

tion foreman and assistant mine foreman (Tr. 6-7). Therefore, the inspector's belief that the section foreman should have prevented the cutting of the crosscut 2-1/2 feet beyond permanent supports is entitled to be given considerable weight.

Moreover, the section foreman, Roger McMicken, was clearly negligent in the way he performed his job on September 15, 1980. The operator of the continuous-mining machine was not the regular operator and the helper of the substitute operator was an inexperienced person in that capacity, at least insofar as cutting with a Joy continuous-mining machine is concerned (Tr. 155-159). Therefore, McMicken should have been paying special attention to the way the entries were being cut because they were all cut on that shift by Watts who was classified as a helper to the regular operator (Tr. 159). McMicken's own testimony shows that he noticed the hole in the face of the crosscut, but stated that he did not see anything else unusual about the crosscut (Tr. 199). The inspector's attention had been directed to the crosscut by the absence of a curtain. When the inspector saw the hole in the face of the crosscut, he concluded that ventilation was satisfactory, but then he noticed that the operator of the continuous-mining machine would have had to go beyond permanent supports to mine an entry to the depth the inspector observed (Tr. 13-19). The section foreman should have been able to make an evaluation of the excessive depth of the crosscut and should have left special instructions for the section foreman the next shift to see that the crosscut was bolted as soon as possible so that the excessive area of unsupported roof could be made safe without leaving the area unsupported any longer than necessary.

The inspector discussed the order he had written with both the section foreman on the day shift and the mine foreman. The inspector offered to remeasure the crosscut in their presence if they believed he had made an error, but they declined to have him do so. According to the inspector, the mine foreman's conclusion, after seeing the crosscut, was that the miners who had made the cut just "messed up" (Tr. 23-24). Westmoreland's last witness was Jim Kiser who is Westmoreland's safety manager (Tr. 230). He testified that the mine foreman intended to discipline the section foreman because the mine foreman believed that the miners were at fault in having violated the roof-control plan (Tr. 240).

My decision not to assess any portion of the penalty under the criterion of negligence is based largely on the fact that Westmoreland's mine foreman would have disciplined the personnel involved had he not been influenced to do otherwise by Westmoreland's own safety department. I also took into consideration that Watts, the miner who made the cut beyond permanent supports, had nearly been killed in a roof fall himself and had an excellent reputation for being safety oriented. I believed that Watts was telling the truth when he stated that he did not think he had gone beyond permanent supports and did not intend to go beyond permanent supports. Additionally, I believed that the section foreman could reasonably have relied upon Watts' good reputation for safety in failing to keep a constant vigil over him while he was operating the continuous-mining machine on September 15. Taking all of the aforesaid matters into consideration, I believed that it would be unfair to Westmoreland to assess any portion of the penalty under the criterion of negligence.

There is additional testimony in the record, however, which shows that Westmoreland overstates its case when it argues that no witness was able to suggest anything which Westmoreland could do to increase safety awareness above that which it was already doing. The section foreman, for example, claimed that he had daily contacts with the miners to instruct them in safe mining practices (Tr. 197). On the other hand, Watts, the operator of the continuous-mining machine who cut 2-1/2 feet beyond permanent supports, testified that they had a weekly safety talk or meeting and that they discussed the roof-control plan "fairly often" (Tr. 146).

The discussion above shows that Westmoreland's management was not so entirely free from fault in the occurrence of the violation, that a penalty of \$1,000 is completely unjustified when considered in conjunction with the fact that I did not assess any portion of the penalty under the criterion of negligence. In Nacco Mining Co., 3 FMSHRC 848 (1981), the Commission affirmed a judge's decision finding that the operator was not negligent, but the Commission also affirmed the judge's assessment of a penalty of \$500 because of the seriousness of the violation and the fact that the operator had an unfavorable history of previous violations.

In evaluating the history of the operator's violations in assessing penalties, it is the intent of the Committee that repeated violations of the same standard, particularly within a matter of a few inspections, should result in the substantial increase in the amount of the penalty to be assessed. Seven or eight violations of the same standard within a period of only a few months should result, under the statutory criteria, in an assessment of a penalty several times greater than the penalty assessed for the first such violation. 2/

Exhibit No. 7 shows 29 previous violations of section 75.200 at the Hampton No. 3 Mine during the 24 months preceding the occurrence of the violation cited in this proceeding. All but two of the violations were considered to be "significant and substantial". 3/ Six of the violations occurred in August and September 1982 and the violation here involved was cited on September 16, 1982. The fifth of those six violations was cited in an unwarrantable-failure order issued only 12 days before the instant violation occurred and MSHA proposed a penalty of \$305 for that violation which was paid in full by Westmoreland. Therefore, my penalty of \$1,000 is within the guidelines mentioned in the legislative history because it is three times the amount proposed by MSHA for one of the previous unwarrantable-failure violations of section 75.200.

Since the Commission has held in several prior cases and most recently in Sellersburg Stone Co., 5 FMSHRC 287 (1983), aff'd Sellersburg Stone Co. v. FMSHRC, ___ F.2d ___, 7th Circuit No. 83-1630, issued June 11, 1984, that the Commission and its

Reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 631 (1978).

In Consolidation Coal Co., 6 FMSHRC 189 (1984), the Commission held that an inspector may properly designate a violation cited pursuant to section 104(a) of the Act as being "significant and substantial" as that term is used in section 104(d)(1) of the Act, that is, that the violation is of such nature that it could significantly and substantially contribute to the cause and effect of a mine safety and health hazard. •

the first obvious violation. MSHA assigned only six penalty points pursuant to 30 § 100.3(c) under the criterion of history of previous violations. MSHA assigned a total of 52 penalty points for the violation. If six penalty points are subtracted from that total, the penalty would have been only \$275 when the reduced point total is entered on the penalty conversion table in section 100.3(g) of the assessment formula. In other words, MSHA assessed the penalty under the criterion of history of previous violations. The violation here involved was the seventh violation of section 75.200 to have occurred at the Hampton No. 1 mine within less than a period of 2 months. Consequently, it is obvious that MSHA is still not using the criterion of history of previous violations as Congress intended, or the penalty would have been several times greater than the proposed penalties for violations of section 75.200.

Westmoreland's motion for reconsideration argues that a penalty of \$1,000 is excessive because I assessed \$800 under the criterion of gravity despite the fact that I failed to assess any portion of the penalty under the criterion of negligence. It is a fact, however, that gravity is a separate criterion and the Commission has not held in any case that I am aware of that a judge is precluded from assessing a penalty under the criterion of gravity wholly apart from any other criterion which he may think is appropriate under the criterion of negligence. It is certain that MSHA's assessment formula treats the criterion of gravity as a separate matter in section 100.3(e) of the formula from the criterion of negligence which is considered in section 100.3(d) of the formula. In this case, MSHA assigned 16 penalty points under the criterion of gravity. If 16 points are deducted from the total of 52 points assigned under the formula, it can be seen by application of the formula to the conversion table in section 100.3(g) of the formula that MSHA attributed \$255 of the proposed penalty of \$395 to the criterion of gravity.

The inspector testified that the violation was very serious (Tr. 30-36); the chairman of the safety committee testified that the violation was very serious (Tr. 76-80); MSHA's regional specialist testified that the violation was very serious (Tr. 119-123); Westmoreland's section foreman testified that

that the violation did not occur.

It is my function to consider the preponderance of the evidence in deciding cases. Failure to assess a substantial amount of the criterion of gravity in this proceeding would require ignoring a vast amount of evidence to the effect that the violation was very serious. My failure to assess any part of the penalty under the criterion of negligence may be in error. I probably should not have given as much weight as I did to ameliorating factors hereinbefore discussed, but my failure to assess a portion of the penalty under the criterion of negligence is certainly no reason for me to assess only a token penalty under the criterion of gravity when that criterion is considered in light of Westmoreland's very unfavorable history of previous violations and the fact that Westmoreland is a large corporation which has stipulated that payment of penalties will not lead it to discontinue in business.

For the reasons given above, I conclude that my bench decision assessing \$800 under the criterion of gravity and \$200 under the criterion of history of previous violations to derive a total penalty of \$1,000 should be affirmed.

WHEREFORE, it is ordered:

A) Westmoreland's motion for reconsideration filed December 2, 1984, is denied.

B) Westmoreland Coal Company, within 30 days from the date of this decision, shall pay a penalty of \$1,000.00 for the violation of section 75.200 cited in Order No. 2037676 issued November 16, 1982.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

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August 21, 1984

ETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
NE SAFETY AND HEALTH	:	
MINISTRATION (MSHA),	:	Docket No. KENT 83-209
Petitioner	:	A.C. No. 15-06365-03509
v.	:	
	:	No. 1 Surface Mine
VIRGINIA REBEL COAL	:	
MPANY, INC.,	:	
Respondent	:	

DISAPPROVAL OF SETTLEMENTORDER OF ASSIGNMENT

On March 27, 1984, the Solicitor filed his Response to Order to Submit Information issued in the above-captioned proceeding. At issue is one violation, the proposed settlement of which is \$20, the originally assessed amount.

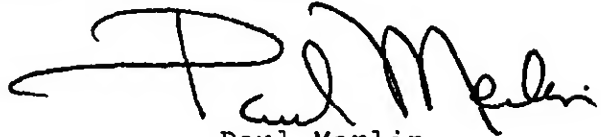
Citation No. 2053339 was issued for a violation of 30 R. § 77.1605(b), because the foot and parking brakes on scraper were inoperative. The Solicitor asserts in his report that the Caterpillar 637 Scraper was operating on the side edge of the coal pit at the time that this citation was issued and that there were no other miners on the ground near this machine. The Solicitor represents that although the machine was without service or footbrakes, it was operating on a very slight incline and was capable of being stopped by the use of its scraper blade or bowl. He also asserts that the machine was not working on rocky ground and was therefore capable of exerting downward pressure with the weight to enable it to stop.

In his original motion, the Solicitor represented that the injury and negligence were moderate. I have consistently held that a \$20 penalty denotes lack of gravity. I am unable to approve a \$20 settlement of a violation which the Solicitor himself alleges is of moderate negligence and injury. Moreover, it may be that the gravity was even more than moderate. Therefore, this case is hereby assigned to be handled by James A. Broderick.

All future communications regarding this case should be

Federal Mine Safety and Health
Review Commission
Office of Administrative Law Judges
Two Skyline Place, Suite 1000
5203 Leesburg Pike
Falls Church, VA 22041

Telephone No. 703-756-6200

A handwritten signature in black ink, appearing to read "Paul Merlin". The signature is stylized with a large, sweeping initial "P" and a cursive "Merlin".

Paul Merlin
Chief Administrative

Distribution:

Thomas A. Grooms, Esq., Office of the Solicitor, U.S.
Department of Labor, 280 U.S. Courthouse, 801 Broadway
ville, TN 37203 (Certified Mail)

Mr. Carl A. Tibbetts, Gardner, Moss, Brown & Rocovio
900 First National Exchange Bank Building, 213 South
ferson Street, P.O. Box 13606, Roanoke, VA 24035
tified Mail)

/nw

AUG 21 1984

DEPARTMENT OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINERAL SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 81-342-M
Petitioner	:	A.C. No. 42-00712-05020
	:	Docket No. WEST 81-343-M
v.	:	A.C. No. 42-00712-05021
	:	
COTT MINERALS COMPANY,	:	Arthur Concentrator
SALT COPPER DIVISION,	:	
Respondent	:	

DECISION

Parties: James H. Barkley, Esq., Peggy Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Kent W. Winterholler, Esq., Parsons, Behle & Latimer, Salt Lake City, Utah, for Respondent.

Judge: Judge Morris

These cases, heard under the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the cases arose from an inspection of respondent's worksite. The Department of Labor seeks to impose civil penalties because respondent violated a safety regulation promulgated under the Act.

Respondent withdrew its notice of contest to the underlying violations but contests the amount of the proposed penalties (Trial).

After notice to the parties, a hearing on the merits was held in Salt Lake City, Utah on September 20, 1983.

Respondent filed a brief at the hearing.

Issues

What penalties are appropriate for these violations?

Stipulation

The two cases here involve 26 separate violations of 30, Code of Federal Regulations, Section 55.14-1.

For these violations the Secretary, in his proposed assessment, seeks penalties in the total amount of \$20,000. There are two citations for the same defective conditions but for the violations the Secretary seeks no penalties.

The regulation violated by respondent provides as follows:

Guards

55.14-1 Mandatory. Gears; sprockets; chains; pulleys; head, tail and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons and which may cause injury to persons shall be guarded.

Summary of the Evidence

On December 12, 1980 MSHA Inspector William W. Williams inspected respondent's Arthur Concentrator (Tr. 6, 7) and issued citations for the violation of 30 C.F.R. § 55.14-1 which requires 26 unguarded ball mills (Tr. 7, 8, Pl-P4). A series of balls in the machines grind ore inside a cylindrical drum to produce concentrate is the resulting product. The drum itself is 4 foot diameter and it is 2 1/2 feet above ground level. The wheel turns inside a stationary drum holder at 60 revolutions per minute (Tr. 9, 10).

On these primary ball mills there were numerous pinch points between the drum holder and its supporting concrete foundation. There are additional pinch points between the drum and the drum holder (Tr. 8, 10; Pl, P2).

A pinch point is that area located between two moving parts or between a moving and a stationary point. An object or material can become caught, pulled, torn, or entangled at a pinch point (Tr. 7, 8).

Photographs show a coke bottle, gloves, a rag and a can on the bottom of the steel ball machine frame (Tr. 10, P4).

Workers maintain the machines by pouring grease on the top. At that point the maintenance worker is exposed to the moving parts.

The twenty six ball mills, a football field in length, are sent to a walkway (Tr. 13). A person on the walkway could or fall into a moving wheel. In the winter a worker's heavy ing could be caught in the machines (Tr. 14).

On the day of the inspection almost all of the unguarded 26 mills were running (Tr. 16, 17). The inspector later died the citation as to two non-operating machines (Tr. 17, But in the inspector's opinion all 26 violations existed. machines that were not running that day were still capable of (Tr. 17, 18).

In the past the inspector had seen guards on similar nes at other concentrators (Tr. 20).

The condition here could cause a serious injury or a ity. An accident would be likely to occur (Tr. 20). ndent has 5,000 workers. A computer printout at the Arthur ntrator shows an prior history of 26 violations of safety ations, excluding the violations in contest in the instant .

An MSHA memorandum of October 3, 1979 deals with a situation the same violations exist in the same area of a mine. The andum requires that one citation be issued (Tr. 26).

At the hearing the judge indicated he would take official e of the MSHA memorandum (Tr. 28).

Discussion

Respondent's brief filed at the hearing raises two issues. ally it is asserted that MSHA may not impose twenty four ate penalties as the result of issuing a single citation. econdary issue respondent claims that the penalties are sive and unfair.

The Act provides that civil penalties may be imposed for the tion of mandatory safety standards. Further, "each rence of a violation of a mandatory health or safety ard may constitute a separate offense" 30 U.S.C. 820(a).

It appears on this record that there were 26 separate ses since all of the machines were unguarded. I find ng in the Act or in the legislative history that would bit MSHA from issuing a single citation for these separate tions.

violation and one citation should be issued. It does not necessarily follow from the memorandum that only one be proposed.

In any event the Commission is not bound by any assessment used by MSHA. Co-op Mining Company, 2 FMS (1980); the Commission can make de novo assessments. Coal Company, 1 FMSHRC 469 (1979). The United States Appeals for the 7th Circuit recently concluded that the Commission, as an independent adjudicative body, was to follow the six criteria in 30 U.S.C. § 820(i) in assessing a civil penalty. Sellerburg Stone Company v. FMSHRC et al., 83-1630, 2 MSHC 2010, 3 MSHC 1385, June 11, 1984.

Following the statutory criteria I find on this record that the Arthur Concentrator has a history of 26 violations in 26 years prior to December 27, 1980 (Exhibit P5). This appears to be an excessive number of violations considering the large size of respondent's facilities. I find the operator negligent in that the unguarded conditions were apparent and the imposition of a penalty will not affect the operator's ability to continue in business. The gravity, in my view, is somewhat less than claimed by Inspector Wilson. The pinch points, located between the rotator and the assembly frame, do not appear to be as readily accessible to miners in the immediate vicinity as the inspector claims. Accordingly, I do not find that the violation is as likely as the inspector contends (Tr. 8; Pl). The respondent demonstrated good faith in installing guards after being notified of the violation.

On balance, I consider a penalty of \$50 to be appropriate for each unguarded ball machine at the site. I am fully satisfied in assessing penalties for the two unguarded machines that were operating on the day of the inspection.

Respondent failed to offer any evidence that the particular machines had been removed from service. I therefore assess a total civil penalty of \$1,300 (26 x 50) should be assessed.

Based on the foregoing findings of fact and conclusions of law I enter the following:

ORDER

1. In WEST 81-342-M and WEST 81-343-M respondent is ordered to withdraw its notice of contest as to the validity of the citations is granted.

s assessed for each such violation.

WEST 81-342-M

<u>Citation</u>	<u>Penalty</u>
583705 A	\$ 50.00
583705 B	50.00
583705 C	50.00
583705 D	50.00
583705 E	50.00
583705 F	50.00
583705 G	50.00
583705 H	50.00
583705 I	50.00
583705 J	50.00
583705 K	50.00
583705 L	50.00
583705 M	50.00
583705 N	50.00
583705 O	50.00
583705 P	50.00
583705 Q	50.00
583705 R	50.00
583705 S	50.00
583705 T	50.00

3. The following citations are affirmed and a penalty of s assessed for each such violation.

WEST 81-343-M

<u>Citation</u>	<u>Penalty</u>
583705 U	\$ 50.00
583705 V	50.00
583705 W	50.00
583705 X	50.00
583705 Y	50.00
583705 Z	50.00

4. Respondent is ordered to pay the sum of \$1,300 within 40 of the date of this decision.


John J. Morris
Administrative Law Judge

James H. Barkley, Esq., and Peggy Miller, Esq., Ofi
Solicitor, U.S. Department of Labor, 1585 Federal R
Stout Street, Denver, Colorado 80294 (Certified M

Kent W. Winterholler, Esq., Parsons, Behle & Latime
State Street, Salt Lake City, Utah 84147 (Certifi

/blo

AUG 21 1984

TARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
E SAFETY AND HEALTH	:	
INISTRATION (MSHA),	:	Docket No. WEST 82-155-M
Petitioner	:	A.C. No. 42-00716-05015
	:	Docket No. WEST 83-60-M
v.	:	A.C. No. 42-00716-05503
	:	
COTT MINERALS COMPANY,	:	Magna Concentrator
H COPPER DIVISION,	:	
Respondent	:	

DECISION

ances: James H. Barkley, Esq., and Peggy Miller, Esq.,
Office of the Solicitor, U.S. Department of Labor,
Denver, Colorado,
for Petitioner;
Kent W. Winterholler, Esq., Parsons, Behle &
Latimer, Salt Lake City, Utah,
for Respondent.

e: Judge Morris

These cases, heard under the provisions of the Federal Mine
y and Health Act of 1977, 30 U.S.C. § 801 et seq., (the
arose as the result of an inspection of respondent's
ngs pond. The Secretary of Labor seeks to impose civil
ties because respondent allegedly violated safety regu-
ns promulgated under the Act.

Respondent denies any liability for these incidents.

After notice to the parties, a hearing on the merits was
in Salt Lake City, Utah on September 20, 1983.

Respondent filed a post trial brief.

Issues

The issues on the contested citations are: whether the
ine of res judicata and collateral estoppel bar the
ions; whether the standard applies to respondent's tailings

In the above case the parties proposed the following settlement:

<u>Citation No.</u>	<u>30 C.F.R. Section Violated</u>	<u>Assessed Penalty</u>	<u>D</u>
577649	55.20-8	\$ 24.00	
577650	55.12-25	40.00	
577651	55.12-32	40.00	
579422	55.20-3A	26.00	
579423	55.20-3A	26.00	
579426	55.20-3A	26.00	
577707	55.11-1	72.00	
579429	55.16-5	52.00	

(Transcript at pages 10-13 in
Docket No. WEST 83-5-M)

On the basis of the record I find that the proposed settlements are reasonable and they should be approved.

Litigated Citations

WEST 82-155 and WEST 83-60-M each contain a citation alleging a violation of 30 C.F.R. § 55.9-22. The statement by the Secretary provides as follows:

Mandatory. Berms or guards shall be provided along the outer bank of elevated roadways.

Summary of the evidence

The evidence, generally uncontroverted, focuses on a general area of respondent's tailings pond. This document first considers the tailings pond area itself and then, in logical order, the three citations involved in the case. The first of the three citations was assigned to Commissioner George A. Koutras. The subsequent citations are considered in each of the pending cases.

The tailings pond

A public highway intersects respondent's 4800 acre tailings pond at its Magna and Arthur Concentrators (Tr. 11, 12-14, 128-131). The tailings pond assimilates each day some 85 tons of sludge derived from the crushing of ore. The deposits in the pond are about 27 percent solid, causes a buildup in the sludge. From time to time it is necessary to increase the height of the discharge pipes (Tr. 12-14, 128-131).

The roadway cited by MSHA furnished access from one side of the tailings pond area to the roads (Tr. 15, 19, 21; Exhibits P1, 2). Contractors, maintenance personnel, dikemen and supervisors travel this road (Tr. 15). At various times respondent has placed berms on the road located below the upper dike level. But these berms, by trapping rainwater, have created unstable conditions for vehicles on the road. Phreatic water and erosion problems have also increased. Any dike failure could cause water to flow into the Great Salt Lake (Tr. 140, 141, 153).

Citation 583706

In due course the above citation evolved into FMSHRC case WEST 81-283-M.

The evidence in the instant case together with the Commission file in WEST 81-283-M establish that on December 10, 1980 MSHA Inspector William W. Wilson issued Citation 583706 1/
alleging a violation of 30 C.F.R. § 55.9-22 at respondent's tailings pond (Tr. 54-59; R-1). After a meeting in January, 1981, the citation was modified to indicate that it applied to inclined access roads at the tailings pond (Tr. 60; Exhibit R-1). MSHA apparently considered that § 55.9-22 applied to inclined access roads (Tr. 60).

Respondent contested the foregoing citation and the issues, as previously stated, were docketed before the Federal Mine Safety and Health Review Commission in Case No. WEST 81-283-M. The case was assigned to Commission Judge George A. Koutras (Exhibit J-1).

Prior to a hearing the parties discussed a settlement. A letter, approved by the company, was forwarded to MSHA's counsel. It stated, in part,

Kennecott will withdraw its Notice of Contest of the citation and the proposed civil penalty in this action if the Department of Labor will agree that the penalty to be imposed for the alleged infraction of that mandatory standard cited will be \$235.00. The currently proposed penalty assessment is \$295.00. In addition, this settlement agreement will specify an understanding that the specific standard which Kennecott is alleged

to have violated in Citation Number 5583700, mandatory standard found at 30 C.F.R. § 55.9 be considered to apply at Kennecott's Arthur concentrator, specifically the tailings pond area to inclined access roads, and not to the entire pond dike. This is our understanding of the or understanding reached between Kennecott and Federal Mine Safety and Health Administration termination of the citation which is the subject of this proceeding.

(Tr. 155; Exhibit J-1).

Subsequently MSHA's counsel filed a motion before Koutras seeking his approval of the settlement. Paragraph 2 of the motion states as follows:

It is to be noted in this settlement that the mandatory standard found at 30 C.F.R. § 55.9 is to be applied at Kennecott's Arthur Concentrator, specifically the tailings pond area, only to inclined access roads and not to the entire tailings pond. See respondent's attached agreement.

(Exhibit J-1).

There was no hearing and on October 19, 1981, Judge Hansen entered a decision approving the settlement.

As a result of the foregoing agreement the company did not have to seek a variance. Respondent's witness indicated the company believed it would only have to apply the standard to inclined access roads (Tr. 155). Pinder further stated that the road cited in the pending cases was flat (Tr. 167).

In 1982 and 1983 MSHA's counsel and MSHA's representative Hansen and Plimpton disputed the company's position that the standard applied to inclined roads (Tr. 161, 162, 182-184; Exhibit P-6).

In the instant cases Inspector Wilson explained that he modified the 1980 citation to show that the road was not elevated. He sought to thereby distinguish it from the term "elevated" (Tr. 186-189). MSHA's position, as stated at this hearing, is that a berm is required on an elevated, inclined, declined, or level road (Tr. 190). The inspector did not intend to force MSHA's authority to issue citations on access roadway. Respondent's tailings pond (Tr. 189).

Inspector Wilson had observed during his inspection that the road providing access on the south side of the tailings pond was unbermed and unguarded for approximately 150 feet (Tr. 15, 20-21). The road, adjacent to the dike house, furnished primary access to the dike area, other pump houses and pipes (Tr. 15). The road was elevated 8 to 12 feet above an adjacent overflow drainage stream (Tr. 19-22; P1, P2). If a vehicle overtraveled the road a serious or fatal injury could result (Tr. 22, 23).

Individuals using the roadway included contractors, maintenance personnel, electricians, dikemen, and supervisory personnel (Tr. 15, 24).

A company representative discussed with the inspector the problem caused by the berm trapping the rainwater. The area has a history of collecting water (Tr. 29). This citation was terminated when a berm was installed (Tr. 31).

WEST 83-60-M - Citation 2083505

A year later, in January 1983, in the same area Inspector Wilson found only remnants of a berm on the roadway. The conditions remained the same as in 1982 (Tr. 31-34). There were no berms or guards for a 150 foot length of the roadway. There were no means available to prevent overtravel on this portion of the road (Tr. 35, 36; P3, P4). Citation 2083505 was issued (Tr. 31-32).

The 1982 citation had been designated as one of a significant and substantial nature. The inspector testified the 1983 citation should likewise have been designated as an S & S violation (Tr. 37).

The 1982 and 1983 citations, if unabated, would ultimately result in an injury (Tr. 38).

The area of the roadway without berms was inclined. The incline was very gentle, like a camel's hump (Tr. 78).

Discussion

Respondent's initial contention is that the decision of Judge George A. Koutras, approving the settlement of the parties, has a res adjudicata effect on the two citations in contest here. It argues that the decision applied § 55.9-22 to "inclined" road. Further, respondent argues that since the road here is flat the

Respondent's contentions lack merit. Section 55, not require berms based on the inclination of a road. obvious on the record here that this portion of the road elevated 8 to 12 feet above the adjacent stream (Tr. 2 Exhibits P1, P2, R2, R3, R4). Accordingly, berms are

Respondent further contends that the roadway was therefore, no berms were necessary. On this credibility credit Inspector Wilson's testimony which is supported by photographs. The evidence is rather clear that the road was inclined. But in any event whether the road was inclined is irrelevant under the regulation.

In addition, the doctrine of res judicata cannot be applied because at no time did Judge Koutras adjudicate the issue of whether respondent violated the berm standard on this roadway. The citations were issued for conditions that existed in 1980, in 1982 and in 1983. Each violative condition was abated. Accordingly, in his decision on October 19, 1983, Judge Koutras could not adjudicate conditions that did not exist in 1982 and later again in 1983.

Respondent further claims that MSHA's citations are barred by the doctrine of collateral estoppel.

Virtually all of the evidence on this issue arises from a letter forwarded to MSHA's counsel from respondent's counsel. Subsequently, MSHA's counsel incorporated the letter into its motion filed with Judge Koutras seeking approval of the settlement (Exhibit J-1). Other than in the modification of the citation, I note that MSHA's officials took no affirmative action concerning what respondent now considers to be its agreement with the Secretary.

At the outset we can agree that equitable estoppel is a doctrine of justice which, in its proper field, prevails over legal rules. City of Chetopa v. Board of County Com'rs, 156 Kan. 133 P. 2d 174, 177 (1943). Generally four elements must be present to establish the defense of estoppel. These are: (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the other party asserting the estoppel has the right to believe it is intended; (3) the latter must be ignorant of the true facts; (4) he must rely on the former's conduct to his injury. States v. Georgia Pacific Company, 421 F. 2d 92, 96, (9th Cir.). In this case elements (3) and (4) are not present in this record.

But even if the record established all of the factual elements to support the doctrine it would not be applied to deprive miners of the protection of the Mine Safety Act because of a public official's mistaken action. Maxwell Company v. NLRB, 414 F. 2d 477 (1969); Udall v. Oelschlaeger, 389 F. 2d 974 (1968). For a discussion of the doctrine of collateral estoppel also see the Commission decision of King Knob Coal Company, Inc., 3 FMSHRC 1417 (1981).

For the foregoing reasons respondent's pleas of res adjudicata and collateral estoppel are denied.

The second contention is that 30 C.F.R. § 55.9-22 does not apply to respondent's tailings pond. Initially respondent argued that 30 C.F.R. § 55.9 speaks to those activities in metal and non-metal open pit mines that are defined in the scope note of the section as "Loading, Hauling and Dumping."

Respondent's contention lacks merit. The Commission has previously rejected this exact argument and ruled that the term "hauling" should be broadly construed. The term includes conveying men, ore, supplies or materials along elevated roadway where the roadways are used in the practice of normal mining. Cleveland Cliffs Iron Co. Inc., 3 FMSHRC 291, (1981).

The facts in this case clearly fall within the Commission's definition in the cited case. The unbermed roadway furnished access to the dike house, the pump house, the electrical substations and the pipeway (Tr. 78). All of the roads are interconnected. It is uncontroverted that the inspector observed respondent's personnel and its vehicles using the road (Tr. 83, 85, 87).

Respondent further claims that neither this Act nor its predecessor, the Federal Metal and Non-Metallic Safety Act of 1966, include within their definitions of a mine the term "tailings pond." Since 30 C.F.R. 55.9-22 became a standard under the present Act by virtue of 30 U.S.C. 961(b)(1) it is asserted that the Secretary must engage in rulemaking procedures to apply 30 C.F.R. 55.9-22 to its tailings pond. In support of its position respondent relies on Usery v. Kennecott Copper Corporation, 577 F. 2d 1113, (10th Cir., 1977). In the cited case the Secretary of Labor under the OSHA ²/ Act adopted an ANSI standard but in the transition the Secretary changed a word from "should" to "shall" without following any rulemaking procedures.

to conclude that the Secretary's proposal to assess a penalty cannot be sustained.

Based on the foregoing findings of fact and the law I enter the following:

ORDER

WEST 82-155-M

1. The proposed settlement agreement is approved. The following citations and penalties are affirmed:

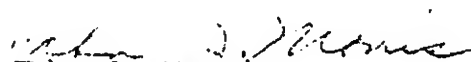
<u>Citation</u>	<u>Penalty</u>
577649	\$ 24.00
577650	40.00
577651	20.00
579423	26.00
579426	26.00
577707	72.00
579429	52.00

2. The following citations and all proposed penalties therefor are vacated:

Citation	579422
Citation	579431

WEST 83-60-M

3. Citation 2083505 and all proposed penalties are vacated.


John J. Morris
Administrative Law Judge

Distribution:

James H. Barkley, Esq., Peggy Miller, Esq., Office of the
Solicitor, U.S. Department of Labor, 1585 Federal Building,
Stout Street, Denver, Colorado 80294 (Certified Mail)

Kent W. Winterholler, Esq., Parsons, Behle & Latimer,
State Street, Salt Lake City, Utah 84147 (Certified Mail)

AUG 21 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
 U.S. DEPARTMENT OF HEALTH :
 AND SAFETY :
 ADMINISTRATION (MSHA), : Docket No. WEST 83-5-M
 Petitioner : A.C. No. 42-01660-05501
 :
 v. : Ore Haulage Plant
 :
 SCOTT MINERALS COMPANY, :
 UTAH COPPER DIVISION, :
 Respondent :

DECISION

Attorneys: James H. Barkley, Esq., Peggy Miller, Esq., Office
 of the Solicitor, U.S. Department of Labor,
 Denver, Colorado,
 for Petitioner;
 Kent W. Winterholler, Esq., Parsons, Behle &
 Latimer, Salt Lake City, Utah,
 for Respondent.

by: Judge Morris

This case, heard under the provisions of the Federal Mine
 Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the
 Act), arose from an inspection of respondent's ore haulage plant.
 The Secretary of Labor seeks to impose a civil penalty because
 respondent allegedly violated a provision of the Act.

Respondent denies that a violation occurred.

After notice to the parties, a hearing on the merits was
 held in Salt Lake City, Utah on September 20, 1983.

The parties waived the right to file post trial briefs.

Issues

The issues are whether respondent violated the Act; if so,
 what civil penalty is appropriate.

Citation 579438

This citation alleges respondent violated Section 102(a) of

These factors, in connection with the BNA publication, lead to conclude that the Secretary's proposal to access a civil penalty cannot be sustained.

Based on the foregoing findings of fact and conclusion of law I enter the following:

ORDER

WEST 82-155-M

1. The proposed settlement agreement is approved and the following citations and penalties are affirmed:


<u>Citation</u>	<u>Penalty</u>
577649	\$ 24.00
577650	40.00
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Citation	579422
Citation	579431

WEST 83-60-M

3. Citation 2083505 and all proposed penalties therefor are vacated.


John J. Morris
Administrative Law Judge

Distribution:

James H. Barkley, Esq., Peggy Miller, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, Stout Street, Denver, Colorado 80294 (Certified Mail)

Kent W. Winterholler, Esq., Parsons, Behle & Latimer, 185 State Street, Salt Lake City, Utah 84103

AUG 21 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
 MINE SAFETY AND HEALTH :
 ADMINISTRATION (MSHA), : Docket No. WEST 83-5-M
 Petitioner : A.C. No. 42-01660-05501
 :
 v. : Ore Haulage Plant
 :
 SCOTT MINERALS COMPANY, :
 SALT LAKE COPPER DIVISION, :
 Respondent :

DECISION

Attorneys: James H. Barkley, Esq., Peggy Miller, Esq., Office
 of the Solicitor, U.S. Department of Labor,
 Denver, Colorado,
 for Petitioner;
 Kent W. Winterholler, Esq., Parsons, Behle &
 Latimer, Salt Lake City, Utah,
 for Respondent.

by: Judge Morris

This case, heard under the provisions of the Federal Mine
 Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the
 Act), arose from an inspection of respondent's ore haulage plant.
 Secretary of Labor seeks to impose a civil penalty because
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Respondent denies that a violation occurred.

After notice to the parties, a hearing on the merits was
 held in Salt Lake City, Utah on September 20, 1983.

The parties waived the right to file post trial briefs.

Issues

The issues are whether respondent violated the Act; if so,
 what penalty is appropriate.

Citation 579438

in such manner that orders, citations, notices, and decisions required by law or regulation to be posted may be posted thereon, and be easily visible to persons desiring to read them, and be protected from damage by weather and against unauthorized removal. A copy of any order, citation, notice or decision issued by this Act to be given to an operator shall be given to the office of the affected mine, and a copy shall be immediately posted on the bulletin board of the mine by the operator or his agent.

Summary of the Evidence

MSHA's evidence: On April 29, 1982, as the result of an accident investigation at the ore haulage plant, MSHA Inspector William W. Wilson issued Citation 579438. The citation was given at 2 a.m. was given to respondent's representative Fred Peterson. The citation was not posted while Wilson was on respondent's property (Tr. 14-16, Exhibit P1).

The following morning Fred Peterson, a representative of the miners on the Magna Safety Committee of the United Mine Workers (Local 392), called Wilson and advised him that the citation could not be located. Thirty minutes later Wilson returned to recheck. On the recheck he was to be accompanied by a witness. Peterson reconfirmed to Wilson that he could not find the citation (Tr. 16, 17).

Wilson went to the plant, arriving there at 9:30 a.m. on April 30, 1982 (Tr. 17). Wilson looked on the track repair bulletin board but he did not find the citation (Tr. 17). The accident for which the citation had been issued involved primarily personnel from the track repair and maintenance (Tr. 18). The time cards for these workers are kept in the track yard office (Tr. 18).

Exhibit P2 indicates that respondent's concentrator and ore haulage plant are, in their totality, complexed in an area which includes a "time office", a "track yard office", and a "time clock office" (Tr. 19-20, Exhibit P1, P2).

On April 30th Inspector Wilson checked but could not find the citation in the yard office or change room for the mine (Tr. 21).

Assignments are made by supervisors at the yard office. In addition, the supervisors' offices are there. Personnel

17). At this location the trackmen (the class of workers involved in the accident) usually have lunch, change and receive their instructions (Tr. 22).

In the near vicinity, across a number of railroad tracks, the building known as the "time clock." This building, which is also for the track people, had not been checked by the inspector (Tr. 22).

In a conversation with the inspector on April 30th between 9:45 a.m. and 10:30 a.m., respondent's safety representatives indicated the citation had not been posted (Tr. 22-23).

Inspector Wilson opted that the citation should have been posted in the "track yard office." But he had checked and it was not at that location (Tr. 24, 25).

Witness Fred Peterson confirmed that he complained to MSHA that the citation had not been posted. After calling the MSHA office Peterson checked for the citation at the "time office", the "yardmaster office", the "trackmen change room", and the "time clock" areas (Tr. 30).

In Peterson's view the normal procedure at the site is to place information on the bulletin board at the yardmaster's office. But the best location to convey the information would be to post it on a small bulletin board inside the trackman's change room (Tr. 32). Trackmen would not look for any information posted at the "time clock" office (Tr. 32). Posting in the time clock building would be contrary to Peterson's experience at the plant (Tr. 32, 33).

Witness Steven Pollock, a trackman in April 1982, was familiar with the "time clock" building. He punches in and out at that location on a daily basis (Tr. 39-40). In April 1982 the "time clock" building did not have a bulletin board (Tr. 40). Pollack's view the proper places to post notices is on the bulletin board in front of the old change room or on one of the two bulletin boards in the new change room (Tr. 41). Pollack could never go to the "time clock" building for information (Tr. 41). Prior to this litigation Pollard hadn't seen any information posted in the "time clock" building (Tr. 43).

In December 1983 the Union Safety Committee, in a letter to the company, requested that a bulletin board be maintained at the concentrator plant time office for the posting of citations, etc. (Exhibit P3).

After he received the citation Klobchar made copy to a staff meeting. He posted the citation between 5 p.m. in the ore haulage track time office building us track people (Tr. 47-49). Wilson, in a telephone call Klobchar that he had not looked for the citation at that particular location (Tr. 49).

Photographs, taken the following week, showed where the citation had been posted by Klobchar (Tr. 50, Exhibit 1).

The practice has been to post citations at the time the citation is issued. Klobchar had never previously posted anything at the location where he posted the April 29 citation (Tr. 53, 54).

Discussion

The facts establish a violation of the Act.

The citation issued on April 29th was not posted "immediately" as the Act requires. Further, it was not under respondent's evidence, posted at a location where it should be protected against unauthorized removal.

On the initial issue Inspector Wilson testified that he issued the citation at 2 a.m. on April 29 (Tr. 15-16). The citation itself indicates it was issued at 10:20, hour time clock. Even if it was issued at the later time, the delay of more than six hours occurred before it was posted. Klobchar testified the citation was not posted until 2 p.m.

"Immediately", as defined in Section 109(a) of the Act, means "without interval of time, without delay, straightaway, without any delay and lapse of time", Black's Law Dictionary, 1979.

Further, respondent's witness Klobchar agrees that the location where he posted the citation there was nothing that would have prevented its unauthorized removal (Tr. 54). In respect to the location chosen, accordingly, did not comply with Section 109(a) of the Act.

Procedural Issues

At the conclusion of the hearing respondent moved to adopt the findings of fact contained in the judge's order of March 2, 1983. The order denied respondent's motion for judgment.

Since the function of the judge when resolving a summary judgment motion is to determine if a genuine factual dispute exists, affidavits may not be employed to resolve disputed factual issues. They may be used only to determine whether any issues actually are in dispute. U.S. ex rel Jones v. Rundle, 453 F. 2d 147, 137 F.2d 1000 (3d Cir. 1971); Fed. R. Civ. P., Rule 56.

Accordingly, I reaffirm my original ruling.

CIVIL PENALTY

The six criteria for assessing a civil penalty are set forth in 30 U.S.C. § 820(i).

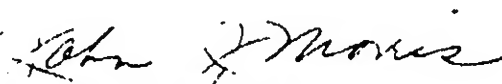
Considering the evidence offered at the hearing on cases heard at the same time as the instant case (WEST 81-242-M; WEST 81-243-M) I find that the operator has a history of 58 prior violations. The minimal penalty will not affect the operator's ability to continue in business and it is appropriate in relation to the large size of the operator. The operator was negligent but a posting violation of this type is of minimal gravity. The file reflects that the operator rapidly abated the violation.

On balance, the proposed penalty of \$20 is appropriate and it should be affirmed.

Based on the foregoing findings of fact and conclusions of law, I enter the following:

ORDER

Citation 579438 and the proposed penalty of \$20 are affirmed.


John J. Morris
Administrative Law Judge

Distribution:

James H. Barkley, Esq., Peggy Miller, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 19 Stout Street, Denver, Colorado 80294 (Certified Mail)

Mr. Richard D. Baker, President, United Steelworkers of America, AFL-CIO, District 38, Sub-District 5, P.O. Box 220, Magna, Utah

AUG

CONSOLIDATION COAL COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEVA 84-2-R
v.	:	Citation No. 20019
	:	
SECRETARY OF LABOR,	:	Rowland No. 3 Mine
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 84-2-R
Petitioner	:	A. C. No. 46-0198
	:	
v.	:	Rowland No. 3 Mine
	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Robert M. Vukas, Esq., Pittsburgh, Pennsylvania, for Contestant/Respondent;
Kevin C. McCormick, Esq., Office of the Assistant Secretary, U.S. Department of Labor, Arlington, Virginia, for Petitioner/Respondent.

Before: Judge Steffey

A hearing in the above-entitled consolidated proceeding was held on June 13, 1984, in Beckley, West Virginia, pursuant to section 105(d), 30 U.S.C. § 815(d), of the Federal Mine Safety and Health Act of 1977. At the conclusion of the hearing and presentation of evidence by both parties, I rendered a bench decision on the substance of which is set forth below (Tr. 216-217).

This proceeding involves a notice of contest filed on October 12, 1983, in Docket No. WEVA 84-2-R by Consolidation Coal Company, seeking vacation of Citation No. 20019 issued on September 12, 1983, pursuant to section 104(a) of the Federal Mine Safety and Health Act of 1977.

on the notice of contest case, the issues are whether a citation was issued and whether it should be sustained or modified. In the civil penalty case, the issues are whether a violation occurred and, if so, what civil penalty should be assessed, based on the six criteria set forth in section 104 of the Act.

Before I formulate a conclusion as to whether a violation occurred, it is necessary that I make some findings of fact which will be set forth in enumerated paragraphs.

1. On September 12, 1983, Inspector Rosiek went to the No. 3 Mine of Consolidation Coal Company. At the mine was a State inspector by the name of Lonnie Christian. Inspector Rosiek had come to the mine for the purpose of enforcing the provisions of the roof-control plan to determine if they were appropriate for the mining conditions that prevailed, it was the practice for a West Virginia inspector to make the determination jointly with an MSHA inspector to make the determination jointly with the roof-control plan filed by the operator with MSHA as to the one which West Virginia recognizes. They were assisted on the inspection by the mine foreman, Jerry Toney.

2. They proceeded to the No. 3-C Section of the mine where the mining crew was engaged in pillaring operations, specifically Pillar No. 6. A cut through the center of the pillar had already been taken, and while the inspectors were observing the mining crew, an additional amount of coal, or as they call it, was taken from the right corner of the pillar. The inspector, at that point, indicated to the foreman that he believed a violation had occurred of the provisions of Drawing No. 4, page 21, of the roof-control plan then in effect (Exh. 3).

3. The inspector remained in the vicinity of the No. 6 pillar until the miners began taking lifts in the sequence shown on Drawing No. 4, according to which lifts marked as one, two, three, four, five, and the pushout at the most outby portion of the right wing are removed. Then the continuous-miner machine is moved up the left entry and used to take lifts six, seven, eight, nine, and the final pushout at the outby portion of the left wing.

4. The inspector marked the block on the citation which was labeled "significant and substantial" 1/ because he believed

Consolidation Coal Co., 6 FMSHRC 189 (1984), the Com-

that removal of the right corner of the left wing the support provided by the left wing and cause a tion of weight. His reason for that belief was ba fact that the lift taken from the right corner was feet wide at its inmost point and left only about coal standing at the extreme end of the left wing. that if he remained in the vicinity of active mini until lifts six and seven had been taken, the dang eliminated.

5. Testimony was also given in this proceedi spector named Darlie F. Anderson. Both Inspector Inspector Rosiek are what is known as coal mine in specializing in roof control. The difference betw tor Anderson and Inspector Rosiek lies in the fact tor Anderson has had a lot more practical experien spector Rosiek, and apparently another reason for Anderson's testifying, in addition to giving his c on his practical experience, was that he had parti revision or modification of the roof-control plan curred after Inspector Rosiek's Citation No. 20019 The inspector had stated in Citation No. 2001967 (

The approved roof control plan Permit No. 4-R 70-1141-14 was not being complied with in the pillar on the 3-C(008-0) Section in that a li taken from the left rib after the split had h through prior to mining the right wing. The tion was supervised by Rodney Reed, section f

The change that was made in the roof-control this change was made under the supervision and inv Inspector Anderson, related to a change in Drawing is shown on page 21 of the roof-control plan intro hibit 5 in this proceeding. That change allows Co Coal Company to remove the right corner from the l a pillar after the split has been taken from the m that portion is to be no wider than seven feet at point of the left wing. An additional change in t tion is that instead of inserting eight breaker po "E" shown on Drawing No. 4 of exhibit 5, only four posts are set prior to the taking of the right cor left wing. After the right corner has been remove four breaker posts on the left of the letter "E" a together with five additional breaker posts, before on the right wing is taken.

Inspector Anderson was not present on September 12, but he was given the fact that the roof conditions were good, and it was his opinion that removal of the right corner of the left wing was not a particularly dangerous act of mining. Inspector Rosiek's opinion was, as I have previously indicated, that removal of the right corner of the left wing did subject the miners to additional danger as compared with not removing the right corner.

7. Consolidation Coal Company presented several witnesses the first one being Basil Green, who was the operator of the continuous-mining machine on the day that the inspector wrote the citation. He testified that it had been a question in his mind as to whether it was permissible to remove the right corner of the left wing in the situation that he encountered on September 12, but that he had been assured by management that it was in compliance with the roof-control plan for him to do so. Consequently, he had been taking the right corner of the left wing if a situation prevailed which he felt required him to do so. The condition which Green believed to be necessary before he would remove the right corner of the left wing was that there be some indication of an override of the breaker posts which are placed at the inmost portion of the left entry beside the left wing of the pillar that is being removed. On September 12 he had found that the first four of the eight breaker posts which are shown at the letter "A" on Drawing No. 4 of exhibit 3 had been broken, and therefore he installed four additional breaker posts outby the four remaining posts. As a result of that change in the location of the breaker posts, he said that it was not possible to get the continuous-mining machine up the left entry to the left of the left wing and still remove all of the pillar because his access to the inmost portion of the left wing would be blocked by the additional breaker posts which had been set. And he also had the ability, because of his experience, to evaluate the entire mining situation that prevailed at that time, and he said that there had not been enough of an override to cause a redistribution of weight, so that he did not encounter or see any evidence of a sloughing off of the coal on either the left or the right wing, and that since he did not see or hear any signs of a change in the weight distribution of the roof, he thought it was entirely safe to remove the right corner of the left wing. That is what he did on September 12, and he did so even though the mine foreman, Jerry Toney, was present, and he believed that he was proceeding in accordance with the roof-control plan. He testified that he would not take the right corner

8. Jerry Toney, the mine foreman, also testified, was his belief that he was proceeding in accordance with the roof-control plan. He said that he would not have allowed the continuous-mining machine to take the right corner of the left wing in the presence of a Federal and a West Virginia inspector if he had not believed that it was appropriate, safe, and in compliance with the roof-control plan, and that he felt no hazard existed because of the way they proceeded in this instance.

Another witness who appeared on behalf of Consolidated Coal Company was the superintendent of the mine, Norman Blankenship. He testified that he believed that he was entirely within compliance of the roof-control plan because of the second paragraph on page five of the roof-control plan. This provision appears in both exhibits 3 and 5 and provides as follows:

Where second mining is being done, management shall show on a mine map the sequence of recovering pillars. Pillaring methods shall maintain a uniform pillar line that eliminates pillar points and pillars that project in by the breakline. When conditions dictate that changes be made in the sequence of pillar recovery, such changes shall be authorized by the superintendent or designated mine foreman for the shift involved and shall include additional precautionary measures to be taken to compensate for the abnormal conditions encountered.

It was Blankenship's opinion that the abnormal condition warranted deviation at the time the citation was written, the breaking of the posts, or the indication of some other problem, and that it was necessary that the right corner of the left wing be removed because if that were not done that it would be difficult, if not impossible, to get the inmost portion of the left wing removed without having the continuous-mining machine proceed in by permanent supports. Consequently, if they did not remove the last portion of the left wing by using the sequence of mining shown on Drawing No. 4 of the roof-control plan in effect on September 12, 1983, sufficient coal would be left standing to interfere with the normal dropping of the roof as retreat mining occurred. Blankenship's testimony regarding the adverse effect of leaving coal is supported by Jerry Toney's and the inspector's testimony. In fact, all witnesses agreed that leaving coal in a pillaring section is as dangerous a situation as taking too much coal at a given point. Blankenship also explained that he had made a request for a

right corner of the left wing, and as far as he was concerned he had been in compliance, but having been cited for something which had been the practice at Rowland No. 3 Mine for anywhere from 5 to 10 years, he then concluded that it was necessary to request a modification of the roof-control plan.

9. The request for the modification probably can best be summarized by referring to exhibit A in this proceeding which is a letter showing the type of change that Blankenship thought was essential. That particular exhibit also has the signature of both the day-shift and the evening-shift miners who worked on the 3-C Section, including the signatures of not only the section foremen and the mine foreman, but also the rank and file miners who ran the continuous-mining machine and the helpers of the operators of the continuous-mining machine. The theory behind the request for the modification of the roof-control plan lies in the fact that all of the miners apparently prefer to have all of the coal removed any time a pillar is removed so that there will not be a residue of coal left to interfere with the smooth falling of the gob area as the pillar gets pulled in the retreat-mining process.

Those findings summarize the testimony and exhibits which have been presented in this proceeding. Counsel for the Secretary and for Consolidation made concluding arguments. The Secretary's counsel asserts that there was a violation of the roof-control plan and he argues that it was improper for the mine superintendent to rely upon the second paragraph on page five of the roof-control plan as a device for saying that a different sequence could be used from that shown in the drawing in the roof-control plan in effect on September 12, 1983.

The provision on which the superintendent relied has been quoted in finding No. 8 above, and it appears to me that the superintendent is not entitled to rely upon that provision for the purpose of changing the sequence of the removal of the lifts that are shown in the roof-control plan. The reason for my ruling is based on the third sentence in that paragraph which provides, "When conditions dictate that changes be made in the sequence of pillar recovery, such changes shall be authorized by the superintendent or designated mine foreman for the shift involved and shall include additional precautionary measures to be taken to compensate for the abnormal conditions encountered."

I interpret the quoted sentence to mean that the changes must be made because of some very unusual circumstance that

brought about the removal of the right corner of the roof in pillaring was something that occurred so frequently, it would not be the type of abnormal condition that is cited by the third sentence of that paragraph on page five.

I think that when there is a condition which requires a routine deviation from a particular provision of the plan, that the operator is required to get the change in the way that was done after the citation was written. The operator of the continuous-mining machine said that if he moved 10 pillars, he might feel that it was desirable to move the right corner of the left wing two times out of 10. I believe that that is such a common occurrence that "the conditions" do not exist which would permit the supervisor to rely on the second paragraph on page five of the plan. Since on September 12, 1983, there was not any such provision in the plan which permitted the taking of the right corner of the left wing, as was done at that time, I believe that there was a violation of the roof-control provision alleged by the inspector.

The other point made by both counsel is that the question as to whether the inspector properly checked Exhibit 4, which is the citation itself, the provision is "significant and substantial". Of course counsel for the Secretary argues that Inspector Rosiek properly checked S&S, while counsel for Consolidation argues that he should not have checked S&S.

A decision as to whether a violation has been properly designated as being significant and substantial must be made in light of the Commission's rulings in that area. The term "significant and substantial" was first defined by the Commission in National Gypsum Co., 3 FMSHRC 822 (1981) at page 823 where the Commission stated:

We hold that a violation is of such a nature as to be likely to significantly and substantially contribute to the cause and effect of a mine safety and health hazard if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or an illness of a reasonably serious nature.

As indicated in footnote 1 above, the Commission received in a Consolidation Coal case that an inspector may check

In both the Consolidation case I just mentioned and in Thies Coal Co., 6 FMSHRC 1 (1984), the Commission applied the definition of significant and substantial in four steps. The first step was whether a violation occurred, and I have already dealt with that by finding that a violation of the roof-control plan occurred. The second step in the definition of significant and substantial is whether the violation contributed a measure of danger to a discrete safety hazard. In this instance, there was an alleged discrete safety hazard in that Inspector Rosiek, who wrote the citation, believed that the miners had been subjected to an additional hazard because of a certain amount of support that would have been on the left wing had been removed, thereby leaving less area to support the roof on the left side of the pillar. So there was a discrete safety hazard.

The third step in applying the definition is whether there is a reasonable likelihood that the hazard contributed to will result in injury. The testimony is equivocal on whether the removal of that right corner of the left wing really did bring about a reasonable likelihood that the hazard contributed to would result in an injury, because it is a fact that Consolidation Coal Company was using 4-foot resin bolts in the split which had been taken up through the middle of the pillar, although its roof-control plan provided for a minimum of only 30-inch conventional bolts. Consol had used the cure 4-foot resin bolts because it wanted to provide maximum safety in the pillar removal operation which is necessarily hazardous work.

The inspector, despite the fact that he wrote a violation for the taking of that right corner of the left wing, still allowed the continuous-mining machine to proceed in the normal course of removing the pillar going through lifts two through four, as shown in the drawing in the roof-control plan, and the inspector believed that by the time the lift at the most injury-producing part of the left wing had been taken, the danger had been minimized, that there was no longer any hazard. At that point he left the section.

I cannot find on a preponderance of the evidence in this case that there was a reasonable likelihood that the hazard contributed to would result in an injury, because the only act which had been done here was the removal of the right corner of the left wing of the pillar, and there had been additional weaker posts set before the other lifts were removed. I cannot distinguish the claimed likelihood of injury in this in-

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The other point made by both counsel is that the question as to whether the inspector properly checked Exhibit 4, which is the citation itself, the provision is "significant and substantial". Of course counsel for the Secretary argues that Inspector Rosiek properly checked S&S, while counsel for Consolidation argues that he should not have checked S&S.

A decision as to whether a violation has been properly designated as being significant and substantial must be made in light of the Commission's rulings in that area. "significant and substantial" was first defined by the Commission in National Gypsum Co., 3 FMSHRC 822 (1981) at 823 where the Commission stated:

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As indicated in footnote 1 above, the Commission relied in a Consolidation Coal case that an inspector may

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The inspector, despite the fact that he wrote a violation for the taking of that right corner of the left wing, still allowed the continuous-mining machine to proceed in the normal course of removing the pillar going through lifts two through 10, as shown in the drawing in the roof-control plan, and the inspector believed that by the time the lift at the most inby portion of the left wing had been taken, the danger had been so minimized, that there was no longer any hazard. At that point he left the section.

I cannot find on a preponderance of the evidence in this case that there was a reasonable likelihood that the hazard contributed to would result in an injury, because the only act which had been done here was the removal of the right corner of the left wing of the pillar, and there had been additional breaker posts set before the other lifts were removed. I cannot distinguish the claimed likelihood of injury in this instance on September 12 from the fact that subsequently to the occurrence of the instant violation, Consol was allowed to modify the roof-control plan to insert a provision which allowed Consol, on a routine basis, to take the right corner of the pillar the same way it was being done on

September 12, but under the new and current modification of the roof-control plan, Consol is permitted to omit the setting of four of the eight breaker posts that had been set on September 12 that the inspector wrote the citation. So there has been a modification of the roof-control plan to allow, on a routine basis, almost exactly the same procedure that was used on September 12. The only difference now is that it is currently permissible under the roof-control plan to take the right corner of the left wing, but on September 12 it was not permissible to do so.

The fourth step in application of the significant definition is whether there is a reasonable likelihood that the injury in question will be of a reasonably serious nature. Here again, I have to evaluate the seriousness and the likelihood of injury on the basis of the type of work being performed. I think all witnesses agreed that removing pillars is a hazardous mining procedure. The people who do it have to be trained and experienced to watch for all sorts of indications of what hazards exist. Green, who was the operator of the continuous-mining machine, testified that he did take into consideration the question of whether there had been a weight determination, whether there was sloughing of coal from the roof on the wings on each side, and he made a determination that the pillar could be removed by taking the right corner of the left wing without exposing him or the other men on the crew to a reasonable likelihood of a roof fall which would cause injury.

Inspector Rosiek, who wrote the citation, allowed the miner to finish the taking of the No. 6 pillar, and while he asserted that he felt that there was a very serious exposure to injury, he also conceded and acknowledged the fact that if coal was left on the inby portion of the left wing, rather than removing it, the miners to go in and take the right corner of the left pillar, a safety hazard will occur from the standpoint of future removal of other pillars because there might not be the necessary room for retreat dropping of the gob area as retreat mining continues.

There has to be in retreat mining an overall consideration of so many different factors, that I cannot find that the removal of the right corner of the left wing was a matter that had a reasonable likelihood of injuring anyone in the future. This particular operator of the continuous-mining machine proceeded on September 12. Therefore, I find that the inspector improperly checked S&S on Citation No. 2001967, and I find that Consolidation Coal Company's notice of contest should be limited to the limited extent that the citation should not show

ties have stipulated to certain facts which deal with 1 of the six criteria. It has been stipulated that the 3 No. 3 Mine is owned and operated by Consolidation Coal y and that Consol showed a good-faith effort to achieve compliance after the citation was written.

s for the criterion of the size of the company, it was ated that Consol's annual production is about 45,000,000 and that the Rowland No. 3 Mine produces about 199,000 er year. Those figures support a finding that Consol is e operator. There was no stipulation as to whether the t of a penalty would cause Consol to discontinue in busi- out the Commission held in Sellersburg Stone Co., 5 287 (1983), aff'd Sellersburg Stone Co. v. FMSHRC, _____, 7th Circuit No. 83-1630, issued June 11, 1984, that o financial evidence is presented in a given case, a ay presume that a company is able to pay a penalty with- using it to discontinue in business. Therefore, I con- that payment of a penalty will not cause Consol to dis- ae in business.

ne fourth criterion to be considered is history of prev- olations. Exhibit 7 is a computer printout of the his- f previous violations at the Rowland No. 3 Mine for the ths preceding the writing of the citation here involved. khibit shows that Consol has been cited for three previ- olations of section 75.200. All three violations were d in citations written pursuant to section 104(a) of the ll three violations were cited on March 12, 1982, and oposed a penalty of \$112 for each violation. Those support a conclusion that Consol has not been cited for cularly serious previous violation of section 75.200 at land No. 3 Mine. While the legislative history shows ngress intended for the criterion of history of previous ons to be applied so as to increase the penalty progres- for each repeated violation of the same standard, 2/ s was concerned about repetitious violations which had d within a few months of the violation under considera- t a given time. The evidence in this instance shows nsol has not violated section 75.200 at all during the ths preceding the occurrence of the violation here under ration. In such circumstances, I find that Consol has able history of previous violations which supports a ion that no portion of the penalty should be assessed he criterion of history of previous violations.

the fifth criterion is negligence. As to that criterion,

is even less than the inspector indicated because Consol management believed that the company had a right under roof-control plan in effect when the citation was written. The citation required the company to extract pillars in the way the miners were operating on September 12, 1983. The argument made by Consol in support of its having proceeded the way it did is logical and in a position which had some merit, particularly in view of the fact that the taking of the right corner of the left wing was a practice which had been followed for from 5 to 10 years prior to the writing of the citation involved in this case. Consequently, I find that the degree of negligence associated with the violation was very low, bordering on none. For the aforesaid reasons, I conclude that no portion of the penalty should be assessed under the criterion of negligence.

The sixth and final criterion to be considered is the one I have already indicated above in my discussion of the "significant and substantial" that there was no reasonable likelihood that anyone would be injured from the cut taken off the right corner of the left wing. In such circumstances, there is hardly any reason to assess a penalty from the fact that assessment of a penalty is mandated by the Act once a violation is found to have occurred. 3 FMSHRC 1895 (1981). In view of the fact that a large number of miners are involved, I believe that a minimal penalty of \$400 should be assessed for the violation of section 75.200 alleged in Citation No. 2001967.

The Commission held in C.C.C.-Pompey Coal Co., 1 FMSHRC 1195 (1980), that a judge is obligated to reconsider his rulings made in a bench decision if, during the interval between the rendering of the bench decision and its issuance in final form, the Commission issues a decision establishing a penalty which conflicts with the rulings made by the judge in his bench decision. The holding in the Pompey case applies to the bench decision set forth above because the Commission issued its decision in United States Steel Corp., 6 FMSHRC 1423 (1981). I had rendered the bench decision in this proceeding, and the Commission majority reduced one of my civil penalties from \$1,500 to \$400 and another penalty from \$80 to \$70. I have carefully reviewed the findings made in the bench decision and I do not believe that they conflict in any way with the holdings made by the Commission majority in the U. S. Steel case. Therefore, I do not think that the penalty of \$400 assessed in the bench decision needs to be further reconsidered in light of the Commission's U. S. Steel decision.

WHEREFORE, it is ordered:

checking of the term "significant and substantial" in item
a of the citation. The notice of contest is otherwise
and the citation is otherwise affirmed.

B) Within 30 days after issuance of this decision, Con-
solidation Coal Company shall pay a civil penalty of \$25.00
for the violation of section 75.200 alleged in Citation No.
7 issued September 12, 1983.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

tribution:

M. Vukas, Esq., Consolidation Coal Company, 1800 Wash-
ington Road, Pittsburgh, PA 15241 (Certified Mail)

C. McCormick, Esq., Office of the Solicitor, U. S. Depart-
ment of Labor, Room 1237A, 4015 Wilson Boulevard, Arlington, VA
(Certified Mail)

AUG 24

ENERGY COAL INCOME	:	CONTEST PROCEEDINGS
PARTNERSHIP, 1981-1,	:	
Contestant	:	Docket No. KENT 83-30-
	:	Citation No. 2053481;
v.	:	
	:	Docket No. KENT 83-31-
SECRETARY OF LABOR,	:	Citation No. 2004021;
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 83-32-
Respondent	:	Citation No. 2004022;
	:	
	:	Docket No. KENT 83-33-
	:	Order No. 2004023; 10/
	:	
	:	Docket No. KENT 83-34-
	:	Citation No. 2053293;
	:	
	:	Docket No. KENT 83-35-
	:	Citation No. 2053294;
	:	
	:	Docket No. KENT 83-36-
	:	Citation No. 2053295;
	:	
	:	Docket No. KENT 83-37-
	:	Citation No. 2053296;
	:	
	:	No. 15 Surface Mine
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDI
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 83-153
Petitioner	:	A.C. No. 15-13382-0350
	:	
v.	:	Docket No. KENT 83-154
	:	A.C. No. 15-13382-0350
ENERGY COAL INCOME	:	
PARTNERSHIP, 1981-1,	:	Docket No. KENT 83-169
Respondent	:	A.C. No. 15-13382-0350
	:	
	:	No. 15 Surface Mine

SETTLEMENT DECISION

1984, on June 26, 1984, July 5, 1984, and July 12, 1984. The motion for settlement was amended on July 5, 1984, the mine operator indicated a willingness to pay the amount of penalties as originally proposed by the jury rather than the reduced amounts first suggested in the motion for settlement.

These cases arise from the death of bulldozer operator Farrar on October 20, 1982, at the No. 15 Surface the Energy Coal Income Partnership in Davella, Kentucky. His death occurred when the outer portion of the roadway over the highwall collapsed under the weight of the bulldozer he was operating. The deceased was thrown and crushed by the bulldozer as it rolled over. The investigation revealed that the bulldozer's seat belts had previously been removed.

The evidence shows that earlier on the day of the accident the day shift bulldozer operator had been working on the south side of the surface operation. At the completion of his shift as he approached the highwall catch-bench from the south side to return to the portal he noticed that part of the highwall berm had collapsed. He then built a "barricade" of dirt with his bulldozer as a warning to persons travelling south to north. The operator then instructed a new roadway through the pit.

The day shift supervisor on the south side, Manuel Cantrell, shortly thereafter travelled towards the catch bench to inspect the high wall erosion, the barricade, and the new roadway. While he decided to drive through the pit over the road he took no action to barricade or close off the end of the road and did not report the dangerous conditions. Shortly before 4 p.m. mine superintendent Mike Cantrell and second shift foreman Jarvis Hackworth travelled over the subject roadway. Cantrell saw the slip starting on the outer edge of the roadway. He said that he told Hackworth not to use the road but Cantrell nevertheless continued to use the road himself and, indeed, drove right over the dirt barricade that had been erected by the day shift bulldozer operator at the south end. Hackworth also continued to use the subject road and later transported the deceased and the miner over the same road.

road and highwall conditions were "good." The evidence shows that aside from the efforts of the day shift bulldozer operator to erect a dirt barricade at one entrance to the roadway the deteriorating high wall and roadway condition were not properly reported, corrected, nor barricaded. Moreover, while it appears that the mine superintendent expressed some concern about the continued use of the sub roadway because of its deteriorating condition, he and his foreman continued to use that roadway and indeed the victim himself was transported across that roadway by the foreman shortly before the fatal accident. The message reasonably inferred under the circumstances was that management was seriously concerned with the dangerous road condition and there was no immediate need to stop using it.

Citation No. 2004021 alleges a violation of the standard at 30 CFR § 77.1713 for failing to record or correct the unstable condition of the catch-bench roadway and in failing to properly barricade the roadway to prevent access. A penalty of \$10,000 was initially proposed by the Secretary; a reduction to \$5,000 was proposed in the initial motion for settlement. The representations in that motion in support of the penalty reduction are not, however, supported by the investigative report and statements of witnesses. Indeed, the material respects the representations are in direct conflict with the investigative report. The report and the evidence in support thereof were available at the time the penalty of \$10,000 was assessed and, according to Special MSHA Investigator John S. South, no new evidence has since been developed concerning the violations.

Manuel Ward, the day shift foreman, admittedly had seen the dangerous conditions of the highwall road toward the south end of his shift around 3:30 of the afternoon at issue and observed the dirt barricade erected by the day shift bulldozer operator at the south end of the road. Ward nevertheless failed to report the unstable condition and failed to see that the north end of the roadway was barricaded. In light of his clear knowledge that the road was unsafe to travel, I find his failure to report and correct the road condition to have been an omission of gross negligence.

According to the night shift foreman, Jarvis Hackworth, at the beginning of his shift at 4 p.m., Mine Superintendent Mike Cantrell told him "we're going to have to quit using this road" referring to the subject catch-bench roadway. Even assuming, arguendo, that such a statement had been made, it apparently was made with no intent of immediate enforcement.

passengers. Hackworth conceded moreover that even a barricade erected by the day shift bulldozer operator at the south end of the road was not sufficient to block the road and that he twice drove over the barricade with his pickup truck -- once with the deceased as his passenger. The truck had still not been properly barricaded nor reported missing at 5 p.m. when the fatality occurred.

Mine Superintendent Mike Cantrell stated that during the course of the day shift and between shifts he had travelled the subject roadway several times. Passing over the roadway around 3:30 that afternoon he saw that the berm had eroded and he concluded at that point that the road was unsafe. He thought he had told night shift foreman John Hackworth that the road was "slipping off or breaking apart" but did not instruct Hackworth to barricade or close the road off.

Within this framework of evidence it is clear that the cause of the accident that is the subject of this proceeding was the result of gross negligence. Management personnel concede that the roadway condition was hazardous and the seriousness of the hazard was evident from the accident that did in fact occur.

As further justification for the proposed penalty assessed on the mine operator presented information concerning the financial condition including financial statements and the history of the petition for reorganization under Chapter 11 of the Bankruptcy Act. I have taken this information into consideration. In light of the high gravity and gross negligence associated with this fatal accident and considering the history of violations and size of the mine operator involved, it is clear that a penalty of \$10,000 would ordinarily be warranted. Considering however, the financial condition of the mine operator and that the facts underlying this violation are essentially the same as those supporting other violations assessed in these cases, I believe a penalty of \$7,500 is appropriate.

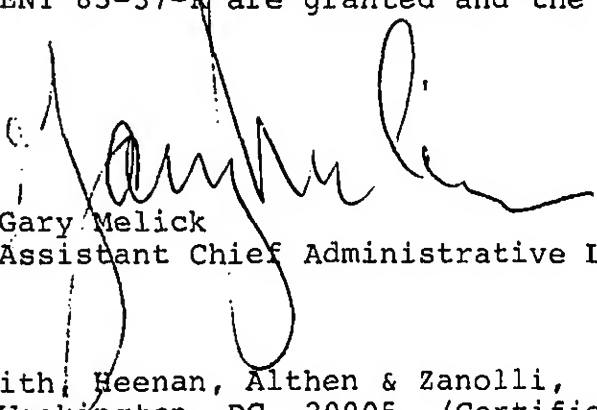
Citations No. 2053293 and 2053294 allege violations of the standards at 30 C.F.R. § 77.1701(i) and 30 C.F.R. § 77.403 respectively, and primarily concern the failure of the mine operator to have provided operative seat belts on the bulldozer. The evidence shows that the buckle or locking device had been removed thus rendering the belts ineffective. The investigators concluded that had the

Citation No. 2053295 alleges a violation of the standard at 30 C.F.R. § 77.1606(c) and charges more particularly that the left brake on the subject bulldozer was defective causing a sharp left turn upon application. The investigators could not however, conclude that the cited defect either contributed or did not contribute to the fatal accident. The mine operator has agreed to pay the initially proposed penalty in full and considering the criteria under section 110(i) of the Act I feel that the proposed penalty is justified.

Citation No. 2053296 alleges a violation of the standard at 30 C.F.R. § 77.1001 and charges that loose hazardous material had not been stripped for a safe distance from the top of the high wall and that loose and unconsolidated material had not been sloped to an angle of repose. The mine operator has agreed to pay the proposed penalty in full. The underlying facts supporting this violation are the same as those supporting the violation in Citation No. 2004021 and for which I have assessed a penalty of \$7,500. To the extent that the factual basis for the violations is similar it would be inappropriate to assess another penalty of the same magnitude. Under the circumstances I find that the proposed penalty is appropriate.

ORDER

Energy Coal Income Partnership (1981-1) is hereby ORDERED to pay the following civil penalties within 30 days from the date of this decision: Citation No. 2004021 - \$7,500, Citation No. 2053293 - \$227, Citation No. 2053294 - \$2,000, Citation No. 2053295 - \$227, and Citation No. 2053296 - \$227. The requests to withdraw Contest Proceedings, Docket Nos. KENT 83-30-R through KENT 83-37-R are granted and the cases are dismissed.


Gary Melick
Assistant Chief Administrative Law

Distribution:

Barbara L. Krause, Esq., Smith, Heenan, Althen & Zanolli,
1110 Vermont Avenue, N.W., Washington, DC 20005 (Certified

Mary Sue Ray, Esq., Office of the Solicitor, U.S. Department

AUG 24 1984

GOFF, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. LAKE 84-86-D
: MSHA Case No. VINC CD 84-03
YOUGHIOGHENY AND OHIO :
AL COMPANY, : Nelms No. 2 Mine
Respondent :

DECISION GRANTING DISMISSAL

re: Judge Melick

In his complaint filed with this Commission on July 6, the Complainant, Mr. Goff, alleges that he was discharged by Respondent in violation of section 105(c)(1) of Federal Mine Safety and Health Act of 1977, the "1977 1 because of an underlying medical condition, moconiosis.

In John Matala v. Consolidation Coal Company, 1 FMSHRC 979), the Commission held that review of discrimination complaints of a miner based on allegations that the miner

ection 105(c)(1) of the 1977 Act provides as follows:
"No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluation and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or

suffers from pneumoconiosis should be resolved under specific statutory provisions set forth in section 4 of the Black Lung Benefits Act ² rather than under the

2 Section 428 of the Black Lung Benefits Act provides follows:

"(a) Mine operators. No operator shall discharge in any other way discriminate against any miner employed by him by reason of the fact that such miner is suffering from pneumoconiosis. No person shall cause or attempt to cause an operator to violate this section. For the purposes of this subsection the term "miner" shall not include a person who has been found to be totally disabled.

(b) Determination by Secretary; procedure. Any person who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) of this section, or any representative of such person, may, within ninety days after such violation occurs, file an application with the Secretary for a review of such alleged discharge or discrimination. A copy of the application shall be furnished to such person who shall be the respondent. Upon receipt of such application, the Secretary shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing at the request of any party to enable the parties to present evidence and information relating to such violation. The parties shall be given written notice of the time and place of the hearing at least five days prior to the hearing. Any such hearing shall be of record and shall be subject to section 5332 of Title 5. Each administrative law judge presiding under this section and under the provisions of subchapters I, II, and III of this chapter shall receive compensation at a rate not less than that prescribed for GS-16 under section 5332 of Title 5. Upon receiving the report of such investigation, the Secretary shall make findings of fact. If he finds that such violation did occur, he shall issue an order, incorporating an order therein, requiring the person committing such violation to take such affirmative action as the Secretary deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay. If he finds that there was no violation, he shall issue an order denying the application. Such order shall incorporate the Secretary's findings and conclusions therein.

(c) Costs and penalties. Whenever an order is issued under this subsection granting relief to a miner at the request of such miner, a sum equal to the aggregate of all costs and expenses (including the attorney's

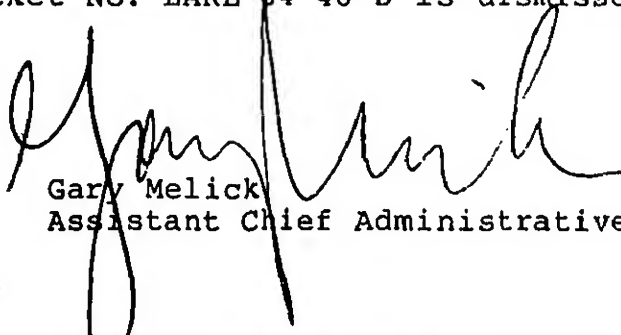
general anti-discrimination provisions of section 110(b) of the Federal Coal Mine Health and Safety Act of 1969, the "1969 Act." That case was, therefore, in accordance with section 428 of the Black Lung Benefits Act, transferred to the Department of Labor for adjudication by one of its administrative law judges.

While the anti-discrimination provisions of section 105(c)(1) of the 1977 Act replacing and enhancing the provisions of section 110(b) of the 1969 Act are broader in coverage than the comparable provisions of the 1969 Act, the rationale for having discrimination complaints based on allegations that the miner suffers from pneumoconiosis resolved under the specific statutory provisions set forth in the Black Lung Benefits Act has continuing validity.

Accordingly, it is appropriate to dismiss further proceedings before this Commission in this case. If the Complainant wishes to proceed with this matter, he should apply to the Secretary of Labor in accordance with section 428 of the Black Lung Benefits Act. ³

ORDER

Case Docket No. LAKE 84-46-D is dismissed


Gary Melick
Assistant Chief Administrative Law Judge

Distribution:

Mr. Gary Goff, 57920 Rockyfork Road, Jacobsburg, OH 43933
(Certified Mail)

Gerald P. Duff, Esq., Kinder, Kinder & Hanlon, 185 West Main Street, St. Clairsville, OH 43950 (Certified Mail)

³ While Mr. Goff's complaint that he presumably filed with the Secretary of Labor under section 105(c)(2) of the Act has not been made a part of this record, it appears from

AUG 29 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 83-70
Petitioner	:	A.C. No. 36-03425-03511
v.	:	
	:	Docket No. PENN 83-78
U.S. STEEL MINING CO., INC.,	:	A.C. No. 36-03425-03512
Respondent	:	
	:	Maple Creek No. 2 Mine
UNITED MINE WORKERS OF	:	
AMERICA, LOCAL 2300,	:	Docket No. PENN 83-77
Intervenors	:	A.C. No. 36-04281-03505
	:	
	:	Dilworth Mine
	:	
	:	Docket No. PENN 83-94
	:	A.C. No. 36-00970-03514
	:	
	:	Maple Creek No. 1 Mine
	:	
	:	Docket No. PENN 83-74
	:	A.C. No. 36-05018-03508
	:	
	:	Docket No. PENN 83-75
	:	A.C. No. 36-05018-03509
	:	
	:	Docket No. PENN 83-76
	:	A.C. No. 36-05018-03510
	:	
	:	Cumberland Mine

DECISION

Appearances: Howard K. Agran, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania, for Petitioner;
Louise Q. Symons, Esq., U.S. Steel Mining Co.,
Inc., for Respondent.

Before: Judge Kennedy

The notice of contest in each of the captioned penalty

the parties' stipulations with respect to the operator's prior violations, ability to pay, and promptness in payment are set forth in the record and were considered and incorporated by reference in the bench decisions. As indicated, disputed issues focused on gravity, likelihood of contributing to another mine hazard, and negligence or culpability.

Penalties Accepted As Final

The operator filed no exceptions to the bench decisions imposing penalties for the following ten violations:

<u>Ticket No.</u>	<u>Citation</u>	<u>Amount</u>
ENNN 83-70	2013726	\$242
ENNN 83-76	2013047	259
	2013052	178
	2013056	50
	2013056	50
ENNN 83-77	1144515	20
	2012080	25
ENNN 83-78	2013734	200
	2013737	227
	9901321	178
	2014016	30
ENNN 83-94		\$1,409

Penalties Rejecting the \$20 Minimal Penalty Limitation.

Eight of the bench decisions rejected the operator's objection to the trial judge's jurisdiction and authority to impose penalties of more than \$20 for violations which he found were not significant and substantial.

In May 1982, MSHA inaugurated an alternate dispute resolution policy for contested violations. Under this program, District Managers were authorized to act as substitutes for the neutral decisionmakers established under section 113 of the Act, 30 U.S.C. § 823, and to conduct off-the-record, ex parte reviews of contested violations. Further, District Managers were authorized to vacate or reduce to \$20 the penalty for a violation promptly abated which they found "was not reasonably likely to result in a reasonably serious injury or illness." 30 C.F.R. 100.4.

The purpose of the new procedure was to insure the success of the administration's new non-adversary, cooperative enforcement policy. District Managers and their delegates do not, of course, enjoy the decisional independence and security of tenure

An example of the policy in action was described in the Commission's decision in Bethlehem Mines, 6 FMSHRC 91, 96-101 (1964).

In an effort to expand the "cooperative enforcement" policy to the limits of its logic, U.S. Steel took the lead in the move to persuade the Commission to require its trial judge to defer to MSHA's no-fault penalty policy by denying them authority to make de novo determinations of the gravity, negligence and penalties warranted for non-S&S violations. An editorial in the Courier/Journal for July 11, 1984, copy attached, noted that big bucks are involved in the "current emphasis on leniency and cooperation." For example, in the first full year under the \$20 minimal penalty policy MSHA succeeded in reducing operators' penalties by \$9.7 million dollars. Such a drastic reduction in penalties signals that mine safety and health is no longer the first priority of business with MSHA.

1/ A recent editorial in the Louisville Courier/Journal headlined "Mine Safety Agency Bespatters Its Own Image," described the effects of the new policy as follows:

Mine inspectors who hear more talk from the higherups about "cooperation" with safety law violators than about firmness are likely to feel that safety isn't the first order of business. When their citations frequently are thrown out or watered down--often without consultation with those who issued them--suspicions seem confirmed.

According to an in depth investigative report published in the same paper on Saturday July 7, 1984, the public perception is that the District Managers' evaluation of 70% or more of their inspectors' citations as insignificant and inconsequential has undermined inspector morale and effective enforcement of the Mine Safety Law. During the first year of operation under the new policy the administration succeeded in reducing the industry's liability for civil penalties for safety violations by over 60%. One of the principal justifications for the no-fault violation policy was to reward operators for prompt abatement of hazardous conditions. Ironically, the effect has been just the opposite because operators have learned that the cost of noncompliance, \$20, is cheaper than the cost of voluntary compliance. Thus, instead of encouraging voluntary compliance the new policy has provided a negative incentive for voluntary abatement of identified hazards. Compare 47 F.R. 22291 (May 1982) with MSHA Documents quoted in Courier/Journal

Act's civil penalty provisions, the Commission's trial stoutly resisted the U.S. Steel's insistence that the Commission's mandate to act as an independent adjudicatory (Article I Court) be subordinated to the operator's in promoting the \$20 no-fault penalty policy. The Commission ruling on the matter occurred on May 31, when, in a decision affirming an earlier ruling by Frederick, the Commission held that as a matter of law all judges were not bound by MSHA's penalty proposals as a matter of policy should not be.

the Commission observed:

The Mine Act divides penalty assessment authority between the Secretary of Labor and the Commission. The Secretary proposes penalties. The Commission assesses penalties. The Secretary's penalty proposals are made before hearing. In the event of a challenge to the Secretary's proposal, the Commission affords the opportunity for a hearing. Thereafter, the Commission assesses penalties based on record information developed the course of the adjudicative proceeding . . . assessing a penalty the Commission and its judges are required to consider the six statutory penalty criteria set forth in section 110(i) of the Act (30 U.S.C. § 820(i)). Thus, the Commission's penalty assessment is not based upon the penalty proposal made by the Secretary, but rather on an independent consideration of the six statutory penalty criteria and the evidence of record pertaining to those criteria . . .

The Act does not condition the penalty assessment authority and duties of the Commission upon the manner in which the Secretary of Labor has chosen to implement his statutory responsibility for proposing penalties. Therefore, it is irrelevant to the Commission for penalty assessment purposes whether a penalty proposed by the Secretary in a particular case was processed under § 100.3, § 100.4, or § 100.5 of the Secretary's regulations. The distinctions that U.S. Steel attempts to draw in this proceeding between a § 100.3 or § 100.4 penalty proposal by the Secretary are without merit and are rejected. Secretary v. United States Steel
Mining Co., Inc., 6 FMSHRC 1148, 1150 (1984).

Commission also rejected the suggestion that "as a matter of policy" it should require its judges to defer to MSHA's violation policy. Noting that such a "policy" would

that it, and its judges, must exercise an independent
tion to insure that the penalties assessed "are effective
"encourage operator compliance." 2/

On June 11, 1984, the United States Court of Appeals
the Seventh Circuit confirmed that Part 100 is not binding
the determination of penalties by either the Commission or
trial judges. Sellersburg Stone Co. v. Secretary, _____
No. 83-1630, 7th Cir. 1984.

As the court noted,

. . . we find no basis upon which to conclude that
these MSHA regulations also govern the Commission's actions.
It cannot be disputed that the Commission and its

2/ A month later, however, the Commission reneged on
holding that penalties must be assessed on the basis of
record evidence by substituting for "reasons unknown or
least unexplained" MSHA's proposed penalties for the
crafted, neutrally oriented findings of its trial judges.
Secretary v. United States Steel Mining Co., Inc., 6
1423 (1984), (dissenting opinion). As the dissenting
Commissioner noted, when the Commission "embarks on the
uncharted waters of independent penalty assessment" its
results are highly inconsistent and "furnish no guidance
for either the parties or its trial judges. Compare
Sellersburg Stone Co., 5 FMSHRC 287 (1983) (Commission
unanimously upheld judge's \$2,000 penalty for interfering
with MSHA's ability to investigate), with United States
Steel Mining, supra (majority arbitrarily reduced penalty for
interfering with inspector's ability to investigate from
\$1,500 to \$400).

The propensity of the Commission's operator oriented
majority to disregard adjudicated penalty findings and
defer, without rational explanation, to the Labor Department
extra-record penalty proposals for serious violations
to undermine confidence in the neutrality and fairness of
Commission's decisions and to thwart the public interest in
effective enforcement of the Mine Safety Law. Compare
Southern Ohio Coal Co., 4 FMSHRC 1459 (dissenting opinion)
United States Steel Mining, supra (dissenting opinion)

1st Sess. 38 (1977). This body is governed by its own regulations, which explicitly state that, in assessing penalties, it need not adopt the proposed penalties of the Secretary, 29 C.F.R. § 2700.29(b) (1983)." Slip Op. 9-10.

For these reasons, I find the operator's challenge to my independent assessment of penalties for the following non-S&S violations is without merit. Accordingly, it is ordered that the bench decisions be, and hereby are, **AFFIRMED**, and the operator pay the penalties assessed.

<u>Docket No.</u>	<u>Citation</u>	<u>Amount</u>
PENN 83-74	2012781	\$100
	2012784	100
PENN 83-75	2011622	75
PENN 83-78	2013730	100
	2013731	75
PENN 83-94	2014005	50
	2014016	30
	2014013	50
	Total	<u>\$580</u>

The Decisions Rejecting the Challenges to S&S Findings.

The Secretary takes exception to one decision that rejected MSHA's S&S finding and the operator challenges eight bench decisions that sustained such findings. Based on an independent evaluation and de novo review of the record evidence my findings and conclusions with respect to these nine violations is as follows: 3/

I. Docket No. PENN 83-74 - Cumberland Mine

A. Citation 2013043

On October 19, 1982, the operator was charged with failing to provide a guard for a 7200 volt electrical

3/ The phrase "de novo determination" has an accepted meaning in the law. It means an independent resolution of a controversy that accords no deference to any prior resolution of the same controversy. United States v. First City National Bank of Houston, 386 U.S. 361, 368 (1967).

cable in violation of 30 C.F.R. 75.807. The standard required that underground high voltage transmission cables "shall be placed so as to afford protection against damage, [and] guarded where men regularly pass under them unless they are 6-1/2 feet or more above the floor . . ."

The inspector observed an unguarded cable, 4 inches in diameter, that was suspended only 5-1/2 feet above the mine floor in an area where miners and mobile equipment carrying supplies regularly passed under it. The inspector believed this created an electrical shock hazard that was "reasonably likely" to result in a fatality or lost work days. This, he testified, could occur if the cable were sliced, smashed or damaged by a piece of mobile equipment or supplies so as to pierce its insulated cover or if an individual miner carrying a sharp tool such as a pick or slate bar were to accidentally thrust the tool through the cable and thus penetrate one of its energized leads. The inspector speculated that a sharp tool such as a pick or digging bar could pierce the cable bypassing the inner protective sheathing and contact an energized 7200 volt lead before the automatic circuit breaker was tripped or activated. He then contradicted himself by stating that the MSHA District in which he works does not understand the requirement for a "guard" to mean what the dictionary says it means, namely, a device to protect the cable from injury by preventing its penetration by a sharp tool but merely a high visibility plastic wrapping. Thus, the inspector said that the learning of his MSHA District is that the intent of the requirement for a "guard" is only a requirement for a "guard" that serves a warning or danger sign such as a sign reading "Danger--High Voltage Cable."

Under this inexplicably narrow construction of the standard, the inspector terminated the citation after the operator installed a piece of yellow plastic PVC pipe of indeterminate mechanical strength cut longitudinally around the lower half of the cable. The totally unguarded condition, which apparently existed for some time, was obvious and should have been reported by the pre-shift examiner.

In rebuttal of the claimed seriousness of the hazard, the operator's senior maintenance training engineer stated that in his expert opinion the cable did not need to be guarded because the inherent protective devices built into the cable and the high voltage system of which it was a part made the need for a guard or even a warning device unnecessary.

ed Cable in question rendered unlikely the possibility
ability that any sharp instrument piercing the cable
become energized. As the operator's expert explained
ound system in the cable is of lower ohmic value than
any piece of metal that might pierce the cable.
ore, "the current would flow back to the ground
tors and make the vacuum breaker operate before it
travel into a piece of machinery and electrocute a man"
54).

conclude, as I did at the hearing, that a high visibility
warning device such as a piece of PVC plastic pipe added
to the electrical and mechanical protection already pro-
vide the automatic deenergizing devices installed in the
ed cable. The absence of the alleged "guard" did not
ore significantly and substantially contribute to an
cal shock hazard.

a series of recent decisions, the Commission has
ear that one of the essential elements of an S&S
is that the underlying violation be of such a nature
create a "discrete," i.e., a recognizable safety
that in the normal course of continued mining opera-
ould contribute to an injury of a reasonably serious

Mathies Coal Company, 6 FMSHRC 1 (1984); Consolidation
Company, 6 FMSHRC 34 (1984); Consolidation Coal Company,
C 189 (1984); United States Steel Corporation, 6 FMSHRC
1984); United States Steel Mining Co., Inc., 6 FMSHRC
1, 1984). I find it beyond dispute that the absence
alleged "guard" in this instance did not create any
on that could reasonably be expected to cause death
ous physical harm before the condition could be

It did not therefore approach even the threshold
nificant and substantial."

t this is not to say that a violation even under the
ted standard did not occur. Having disposed of MSHA's
ge to vacation of its S&S finding, therefore, I turn
operator's claim that the penalty assessed for its
failure to provide a warning sign, \$200, was excessive.
ench decision I found that while the failure to provide
ng sign did not contribute to the likelihood of a
azard it was nevertheless serious because of the "chance
llion" that the absence of the "guard" would fail to

USSM would not file a petition for modification because that would be a useless act. Even if the plastic pipe is not more than a warning sign, the operator cannot establish that a wire (sic) without a warning sign is as safe as one with a sign.

But, the operator argues, since MSHA had interpreted the standard to require only a warning sign and not a protective guard, it was correct in assuming that MSHA did not believe noncompliance presented a serious shock hazard. Thus, it continues, the trial judge erred in finding there was a culpable disregard for compliance that required more than a minimal \$20 penalty. 4/

It is true, of course, that while the risk of a serious shock hazard was remote, its occurrence was not beyond the realm of possibility and its consequences extremely grave--death or a disabling injury. I also felt, and my de novo review confirms that the record supports my finding that noncompliance stemmed from the operator's opinion that the requirement, even in its attenuated form, was arbitrary and above all, unnecessary. I am sure this was the view of its expert witness. But if it was, as counsel concedes, the remedy was to seek a waiver or variance and not to unilaterally disregard the standard. For these reasons, I conclude the operator's decision to disregard the standard rather than seek a variance, waiver or modification demonstrated a lack of regard for compliance that should not be condoned by assessment of a token penalty. On reflection, however, I believe a lesser penalty than tentatively assessed will suff

Accordingly, I reject both parties' exceptions to the bench decision and assess a penalty of \$100 for the violation found.

B. Citation 212365

On October 6, 1982, a 104(a), S&S citation issued a nonpermissible headlight on a Jeffrey Ramcar. The ramcar was parked in a crosscut awaiting repair of a broken trunion approximately 500 feet from the face. The headlight on the right, outby side had a damaged packing gland that permitted the power cable to be moved freely by hand in and out of the

4/ The operator also claimed that in the absence of a valid S&S finding, my jurisdiction was limited to assessing a pena

tion, the operator was unaware of the existence of the permissibility violation.

The undisputed facts showed the power wires entered the headlights through a copper nipple or ferrule which had been broken off and a rubber conduit hose that had been stripped so as to expose the power wires. As a result, the power wires were not clamped in place which caused a strain on the terminal connections inside the headlight. Because of the strain to the seal around the power leads the flame-path protection against ignitions or explosions within the headlight was inoperative. The operator challenges only my affirmation of the S&S finding.

The operator's expert testified that because the heat generated by a headlight does not exceed 350 degrees Fahrenheit the ignition point of methane is 1100 degrees the violation could not contribute to the cause and effect of a mine fire explosion. I considered this to be irrelevant since the question was not whether the headlight could cause a fire or explosion but whether a spark or arc from damaged power leads could cause a fire or explosion. As to the latter there was no dispute. The operator also argued that a light on the outby side of the ramcar would never enter a 5 to 15% concentration of methane. It was also argued that since nothing in an unbroken headlight could cause an arc, something would have to fall on the headlight to create a spark of sufficient intensity to cause an explosion. Finally, the operator pointed out that the machine was not energized, was not operating in by the last open cut, and was out of service due to the broken trunion. I considered all of these contentions irrelevant. It was noted that since the ramcar was checked for permissibility once a week and the operator was unaware of the permissibility violation it could have been returned to service without correction of the condition.

The Cumberland Mine is classified as a gassy mine that releases 3.5 million cubic feet of methane a day. This gas is emitted not only from the face and gobbed out areas but also from bleeders in and along the ribs. Consequently, even in the presence of much loose coal and coal dust, it is not unusual for either in by or outby headlights to be energized by loose and falling coal or rock or by striking the rock. When and if this occurred it was likely that arcs and

sparks could result in ignitions or explosions in the lights. While damage to lights can cause arcs and sparks even when the packing gland has not previously been replaced, the failure to maintain the gland in a permissible condition increases the risk or likelihood that a light with a flame-path will cause an ignition that may not be contained within the light in the presence of an explosive concentration of gas or float coal dust.

The inspector considered the violation "very serious." He believed it could contribute to an ignition that might in turn cause a fire or explosion with resulting fatalities. On the other hand he considered the negligence slight because the condition, he thought, had occurred since the last inspection and in the interim was not readily observable by anyone not making a check for permissibility. But, this could also result in the ramcar being put back in service after the repairs to the trunion were accomplished without correction of the permissibility violation.

In my bench decision (Tr. 728), I found that if there was a malfunction or damage to the headlight that caused a spark or spark the absence of flame-path protection in this light could significantly and substantially contribute to the cause and effect of a mine safety hazard and assess a penalty of \$178.

Applying the Commission's analytical construct from supra, including the deference to be given the expert opinion of the inspector who found it was "reasonable to believe" that the broken seal on the headlight could provide the link in the chain of causation from an ignition in the leads to a fire or explosion, I conclude that the probability of such an event was not so remote as to be unexpected or unforeseeable in the normal course of mining operations. I find, therefore, that on the basis of the record considered as a whole, the evidence shows the underlying permissibility violation significantly and substantially add, both qualitatively and quantitatively, to a "discrete" safety hazard, namely, the presence of a flame-path or explosion, that could result in death or serious injury.

For these reasons, the operator's exceptions to my bench decision are denied and the penalty assessment of \$178 is affirmed.

Conveyor Belt. The absence of the guards was not
enged. The operator contends only that the violation
ot significant and substantial.

The undisputed facts showed that at 12 different loca-
and at various heights ranging from 2 inches above the
Floor to about 5 feet drive rollers up to 2 feet in
ter were unguarded for distances of up to 20 feet along
ide and tight side of the beltline. This exposed miners
the parallel 5 foot wide travelway on the wide side to
ental contact with the rollers as the miners performed
dusting or fireboss duties or carried supplies from one
to another using the travelway. On the tight side
are resulted when rock dust was spread while the belt was
ion.

The absence of the expanded metal guards presented multiple
point hazards which could result in hands, arm or legs
g accidentally caught between the moving rollers and the
ne. The unguarded condition could result in severed or
bered limbs, traumatic amputations, or a fatality.

The guards removed from the supporting vertical posts
ound in a crosscut about 50 feet away. The fact that
ere covered with mud, rock dust and coal dust indicated
ad been there for some time. Even so, there were not
e expanded metal guards to provide protection for the
length of the unguarded rollers on the wide and tight

There was conflicting evidence over whether the walkway
mp and slippery or dry. Since the tail roller was under
lkway a miner would have to fall or slip from the walkway
ome entangled. While these circumstances may or may
ve attenuated the risk with respect to this roller, they
sly did not eliminate it. The evidence also showed the
t posts for the missing guards were 4 to 5 feet apart and
hes from the edge of the walkway and drive rollers. These
ions did not provide a protection by location.

The operator claimed the absence of the guards could not
icantly and substantially contribute to the pinchpoint
because the evidence does not support a finding that an
nt involving the pinchpoints "would be reasonably likely
ur" before the condition was voluntarily abated. The
or claims that to assume the condition would "never be
ted significantly alters the test to be applied." The

The appropriate time continuum in my judgment is whether there is a reasonable likelihood that normal mining operations can be expected to continue before the hazardous condition is abated. Eastern Associated Coal Corp., 491 F.2d 277 (4th Cir. 1974); U.S. Steel Mining Co., Inc., 6 FMSHRC ____ (July 11, 1984). Here the evidence amply supports the conclusion that the condition had existed for some time prior to issuance of the citation and that absent issuance of the citation the pinchpoint hazard would have continued to exist for a time sufficient for an accident to occur before the condition would have been "voluntarily" abated.

For these reasons, the operator's exceptions to the belt decision are denied and the penalty assessed, \$120, is affirmed.

B. Citations 2012379, 2012380, 2011625.

These three citations involved the absence of water sprays at dumping points. Citation 2012379 was occasioned by the inspector's reading of the operator's preshift examination reports. They showed that on three consecutive working days, Friday, November 5, Monday, November 8, and Tuesday, November 9, 1982, the preshift examiner (fireboss) had reported a hazardous condition on the Main Face South Conveyor Belt. This consisted of an excessive accumulation of float coal dust at numerous locations around the No. 2 conveyor drive for a distance of approximately 100 feet. The dust had collected on the belt structure, the electrical drive motors and the power cables. The electrical power sources while protected with short circuit devices were not permissible.

When the inspector arrived on the scene, he observed that the belt was energized and running and that the atmosphere was visibly dusty with large amounts of float coal dust deposited on the ribs and roof. As a result of his observations, the inspector issued a 75.316, 104(a), S&S, citation. 5/

It alleged a violation of the operator's Methane and Dust Control Plan in that water sprays were not provided at the belt transfer point. The operator admitted the violation but contested the S&S finding.

Water sprays are required at belt transfer points to precipitate float coal dust from the atmosphere thereby reducing the concentration of respirable and explosive coal dust. In this case, the presence of a visible concentration of dry float coal dust created both a health (respirable dust)

fety hazard. Miners working on the beltline and else-
were subjected to the hazard of a fire or explosion if
ition source were to ignite the float coal dust or a
e bleeder. The inspector testified these hazardous
ions existed in the presence of nonpermissible electric
and where hot rollers or friction from a misaligned
ould occur at any time. As the preshift reports estab-
, the condition was one about which the operator knew or
have known.

he operator's assistant mine foreman claimed the accumu-
of float coal dust could have occurred even if the
had been installed and made operative because much
coal dust comes from the bottom belts for which no
are required or from other sources such as the ventila-
ystem. From this counsel for the operator argued that
ld not be assumed that the absence of the water sprays
transfer point significantly and substantially contri-
to the hazardous accumulation of float coal dust.

n rebuttal, the inspector testified that the accumula-
f float coal dust observed could not be attributed
to dust from the bottom belt. He admitted the sprays
t completely suppress or control the suspended float
ust but was certain that the absence of the required
permitted much of the excessive accumulation that he
ed. He was also of the opinion that if an electrical
ction occurred it was "highly probable" that an ignition
cause the float coal dust to ignite.

itation 2012380 was issued for the absence of water
at a belt transfer point inby the point cited in
on 2012379, supra. Twenty-four hours after this cita-
ssued, the inspector issued a 75.400, 104(a), S&S
on on the same area, the 128 West Conveyor Drive.
1 for the operator argued that because sprays were
led by the end of the shift on November 9, 1982, and the
citation did not issue until the next day is proof that
rays were ineffective and inconsequential in preventing
cumulation of float coal dust.

he accumulation cited, and not contested, was that float
ust on previously rock dusted surfaces was permitted to
late on the mine floor from rib to rib in the belt entry
osscuts for a distance of 200 feet. In addition, loose
al and coal dust had been permitted to accumulate under
ive and rollers on the drive motor in amounts up to

he cited on the 10th. He conceded it was possible that he not see it because it was not there on the 9th. I find that in view of the large accumulation found under the drive and rollers it was more probable than not that the accumulation existed at the time the 75.316 citation issued on November but that the inspector overlooked it.

The parties stipulated that the same two witnesses who testified in support of and in opposition to Citation 20123 would give similar testimony with respect to the gravity, negligence, and significant and substantial nature of the violation.

Citation 2011625 was issued on November 12, 1982, for failure to provide water sprays on the feeder located at the 52 Main East Section in violation of the same Methane and Dust Control Plan that applied to Citations 2012379 and 2012380. The belt, which was energized but not running when observed, had three water sprays mounted on a bar approximately 300 to 400 feet out by the face at the point where the shuttle cars dumped on the feeder to the main conveyor belt. The sprays were inoperative because no hose was attached to the to supply water.

Coincident with his observation of the inoperative water sprays the inspector saw a shuttle car dump a load of coal on the feeder. When this failed to activate the water sprays the inspector noted the absence of the water hose. Looking further, the inspector observed and wrote a 104(a), S&S citation for a 75.400 violation that disclosed an accumulation of loose, dry, coal dust to a depth of 21 inches in an area around the sequence roller that measured 6 feet wide by 6 feet long. He also noted an accumulation under the tail roller that was 4 feet by 4 feet that was wet. The sequence roller, however, was turning in loose, dry coal and coal dust. This citation was not contested.

As in the case of the other two citations, the inspector testified that it was reasonably foreseeable that the absence of the water sprays could contribute to the hazard of a fire or explosion or to a respirable dust health hazard.

An aggravating circumstance alluded to was the fact that the evidence showed the violation occurred on an intake air split in by the return for the belt air which meant that the respirable dust generated by the absence of the sprays was being carried over the eight miners working at the face.

Since the inspector observed only one load of coal being
d on the feeder and the belt was not running the operator
nded coal was not being produced and therefore no immediate
d either serious or nonserious was presented. The operator
showed that, as the inspector admitted, the accumulation
al under the tail roller was wet but offered no evidence
outt the inspector's showing that under the sequence
r the loose coal and coal dust was dry.

In summing up counsel for the operator argued that because
of the violations occurred in an area that was well venti-
and rock dusted the absence of the water sprays was
nificant and not likely to result in or contribute to a
d that would result in a reasonably serious injury. The
tor asserts that any contribution that the absent sprays
make to a buildup in the dust concentration in each of
areas was so minimal as to make the violations trivial
ertainly not of such a nature as to increase the risk of
ecognizable health or safety hazard.

I do not agree. I admit that quantifying the degree of
tribution each of these violations made either singly or
e aggregate to a respirable dust, fire or explosion
d is impossible. Nevertheless the existence of the spray
ement in the operator's own dust control plan is a plain
nition of the fact that water sprays play a significant
n the suppression of respirable and float coal dust.
er, their absence particularly under the circumstances
appear here, namely, the presence of excessive accumula-
of loose, dry coal and float coal dust in working areas
with potential sources of ignition is persuasive of the
that the underlying violations were of such a nature as
stitute a significant and substantial link in a chain
usation that could result in death or serious physical
y if normal mining operations continued with these
tions unabated.

Accordingly, I find the absence of the sprays could and
ontribute to a significant and substantial increase in
ount of loose, dry float coal dust and respirable dust
uspension and to an increase in the accumulation of loose,
coal dust on previously rock dust surfaces; that such
ulations did, in fact, occur; and that the presence of
dust could contribute to the cause and effect of at least
discrete hazards, namely a health (respirable dust)
l and a fire and/or explosion hazard. Applying the
ssion's analytical construct cited supra, and giving

Upon review of the record considered as a whole, fore, I am constrained to affirm the bench decisions and amounts of the penalties assessed for each of the first violations, \$136 and \$98 respectively. As to Citation I find the aggravating circumstance warrants an increase in the amount assessed from \$100 to \$200.

III. Docket No. PENN 83-76 - Cumberland Mine.

A. Citation 2013051

On November 15, 1982, a 104(a), S&S citation was issued for a violation on an energized torkar shuttle car parked without wheel chocks on a slight down grade in the underground section of the Cumberland Mine. At the time the citation issued miners were observed walking or standing in front of the car on the downhill side. The citation cited the condition was a violation of a notice to provide safety guard issued September 8, 1981. The existence of the violation was undisputed. The operator contested only the S&S fine.

The testimony of the inspector and the walkaround showed that even where the mechanical parking brake on the shuttle car is set the wear and tear on the teeth of the ratchet mechanism may permit the 20 ton vehicle to drift down a hill with sufficient force to crush a miner against the car.

The operator's senior maintenance engineer testified that, while he had no personal knowledge of the condition of the car in question, he believed all the torkars purchased by the operator had a dual braking system. The first system was that described by the inspector and walkaround and similar to the parking brake mechanism found on an automobile. The brake is engaged by pressing the brake pedal down and then pulling back on a lever that locks the foot pedal and the car in place.

The second braking system on the torkar is called "failsafe" brake. This braking system is activated when the car is unattended or shut off by hitting the panic bar. The walkaround testified, and the operator's expert did not dispute, that the "failsafe" brake did not automatically prevent the car from drifting.

The maintenance engineer said the "failsafe" brake is a hydraulically activated spring brake that works as follows: "If the torkar is in movement, and you activate the panic bar, the panic bar deenergizes the pump motor and, at the same time, the hydraulic pressure is released and the spring brake is applied."

et tears up the rotor. Instead of taking such a vehicle
of service, chocks will be used until the "failsafe"
is repaired. The maintenance engineer did not know of
own knowledge whether the "failsafe" brake on the torkar in
tion was operative on the day the citation issued. The walk-
D testified that on the basis of his personal experience
the vehicle the "failsafe" brake was not operative.

The operator's expert testified that "failsafe" is a
ner because no brake is "failsafe" if it is not properly
ained. These particular "failsafe" brakes need a lot of
enance and repair because, he said, the "momentum of a
y ton piece of equipment traveling ten miles an hour
y to a screeching halt within, maybe, ten feet . . .
up the rotor that the brakes grab on to" (Tr. 848).
this occurs, the "failsafe" brake is no longer operative.

Counsel for the operator contended that MSHA had the
a of showing the claimed "failsafe" braking system was
a the vehicle in question, was not operative, and would
ave prevented the car from drifting. A miner who actually
ed the torkar in question, testified that he was never
he vehicle had a failsafe brake or how to operate it
(55-856). He further testified that the torkar drifted
shutting the power off and before setting the mechanical
which led him to believe it had no failsafe brake or at
not one that engaged automatically. I conclude, there-
that MSHA carried its burden of showing that the viola-
charged did, in fact, occur and that it was reasonably
able that the underlying violation, i.e., the absence of
ocks would significantly and substantially increase the
of death or serious physical harm.

Once MSHA established the fact of the underlying violation,
operator had the burden of going forward with evidence to
that the violation was trivial because the shuttle car
fully operative "failsafe" backup braking system that
prevent the car from drifting after the mechanical
was set. Not only did the operator fail to carry its
but, as we have seen, MSHA affirmatively proved that
probability the vehicle in question did not have an
ive "failsafe" braking system.

Applying the Commission's approved analysis we have,
ore, (1) an underlying violation; (2) a discrete safety
--that is, a measure of danger to safety--contributed

hazard contributed will result in injury; 7/ and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 8/

For these reasons, the exceptions to the bench decision are denied and the \$200 penalty affirmed.

IV. Docket No. PENN 83-77 - Dilworth Mine

A. Citation 2011736

The roof control plan for the Dilworth Mine required that at the time this citation issued required that the sum of the diagonal measurements of an intersection exceed 60 feet, "posts or jacks shall be installed to reduce the longest span to 28' or less." On November 8, 1982, a S&S citation issued when measurements taken at the intersection of the number 14 (intake escapeway) entry and number 5 crosscut showed that each of the diagonals measured 32 feet and no posts or jacks had been installed. The existence of the condition cited was admitted. The citation was to the S&S finding.

6/ Quantifying the increase in risk is, as I have not
incapable of proof by mathematical certainty, since no one can say whether the absence of the chocks would necessarily result in a disabling injury or fatality. As Prosser states:

Proof of what we call the relation of cause and effect is that of necessary antecedent and inevitable consequence. It can be nothing more than "the projection of our habit of expecting certain consequence to follow certain antecedents merely because we had observed these consequences on previous occasions." (Citations omitted.) "If as a matter of ordinary experience a particular act or omission might be expected, under the circumstances to produce a particular result, and that result in fact has followed, the conclusion may be permissible to draw that the causal relation exists." Prosser on Torts, p. 40 (4th ed. 1971).

7/ It is self evident that no man is a match for a 20 ton shuttle car.

8/ Experience as well as common sense teaches that the likelihood of a serious or disabling injury, dismemberment

At the time the citation issued, the operator was engaged in retreat mining. Three intersections in by the crosscut in question, at the number 8 crosscut between the 15th and 16th entries and the 26th and 32d pillars approximately 2 feet of the roof shale had oxidized and peeled or flaked away across the entire 16 foot entry leaving the roof bolts exposed.

The inspector believed this condition, which was approximately 400 feet from the overwide intersection, had resulted from override pressure on the roof due to the failure of the operator to effect total caving of the roof in the gobbed or pillared out areas. This explanation for the S&S finding is lacking in evidentiary support and at odds with the inspector's statement that he found no basis for concluding the operator was, or had, engaged in improper pillar recovery methods. The operator's general assistant mine foreman, who accompanied the inspector and personally abated the violative condition by setting three posts in the intersection, testified convincingly that the roof condition in the number 8 crosscut between the 26th and 32d pillars was not the result of a roof fall.

Both witnesses agreed that the roof bolts in the area in question were still firmly anchored in the sandstone rock and that the black shale had fallen or peeled away from between the bolts to a depth of about two feet. The inspector speculated that if all this had fallen at once he would consider it a dangerous unintentional roof fall that might have crushed a miner. The mine foreman, who testified from personal observation of the condition, said the condition did not result from a roof fall but one that occurred over time "when the air hits it and so forth, it just peels off around the pins. The pins are still anchored, hanging about a foot and a half. They are anchored, but nothing massive falling down, just the black shale falling down" (Tr. 360-361).

My de novo review of the record leads me to conclude the inspector erred in finding the condition in the number 8 crosscut was due to override pressure. His own diagram of the area characterized the condition not as a roof fall but as "Broken roof here, will need [to be] rebolted" (GX-6). Indeed, the inspector's initial testimony was that "The roof had pulled away from the bolts. The bolts were hanging down. Everything was broken" (Tr. 329). The inspector also said that because he saw what he thought was a roof fall in by the area in question "You might as well say there was a roof fall there [in the number 8 crosscut] too, but it wasn't above the anchorage line."

The inspector then went on to claim he decided on S&S finding because the operator was not getting "clean falls" of the roof during his pillar recovery. This turned out to be incorrect because on close examination the inspector admitted "No, there was no improper practice on mining pillar line" (Tr. 334-335).

On the basis of the record considered as whole, I find there was no factual basis or credible expert opinion to support a finding that the broken roof condition observed in the number 5 crosscut contributed to the risk of a roof fall in the number 5 crosscut. Both witnesses agreed the roof in the number 5 section was good with no signs of stress. The mine operator readily admitted that someone had improperly removed the support posts that had been set in the intersection and that this was a serious violation of safe mining practice. The inspector found the negligence involved was "moderate."

For these reasons, I hereby vacate the finding in my previous decision and find the condition in the number 5 crosscut serious, but did not significantly and substantially contribute to a different or discrete hazard that could result in death or serious physical harm. I conclude; (1) the violation was not serious; (2) affirm my ruling rejecting the operator's attempt to prove that the sum of the diagonals requirement was not met and contributed nothing to safety; and (3) reduce the penalty from the \$500 initially assessed to \$150.

V. Docket No. PENN 83-94 - Maple Creek No. 1 Mine

A. Citation 2014066

On November 16, 1982, a citation 104(a), S&S citation was issued in the 8 Flat, 56 Room of the Maple Creek No. 1 Mine when the inspector found the ground wire from the frame Ricks Water Gathering Pump twisted together with the rebar ground of the power conductor for the pump. Power was drawn by a fused nip cable from the 550 volt trolley wire. The two grounds were in turn grounded to the mine track ground clamp attached to the rail as shown in GX-12.

The violation, which was admitted, consisted in the fact that the two ground wires were not attached to the mine track or other grounded conductor by separate clamps. 30 C.F.R. 75.701-5. The operator challenged the S&S finding contending that the hazard contributed to -- shock or electrocution -- was remote and speculative to create a reasonable likelihood of

other accident and the twisted ground wires thereby lost their ground to the track, they would continue to conduct the 550 volt current from the overhead trolley wire through the ground frame wire to the frame of the water pump. With the circuit thus completed the pump would continue to operate normally, but with the frame energized with a voltage sufficient to cause a lethal electrical shock.

A miner required to do maintenance on the pump or a miner travelling the track entry on the tight side who had occasion to contact the pump frame while standing in the water that surrounded the pump could ground himself and receive the full force of the 550 volts of power coming from the trolley wire.

The evidence showed the water pump was checked on each shift to see if it was functioning properly and weekly for electrical compliance. The record of the weekly check was too vague to permit the inspector to determine whether this particular pump had been inspected that week or, if it was, whether the inspection included the ground clamp. Both MSHA and the operator had recognized that "robbing" ground clamps was a problem. A solution was found with respect to permanent pumps by welding a roof bolt to the track to serve as a permanent ground clamp.

State law required such clamps to be at least six inches apart. Federal law merely required two clamps. But since both laws had to be read together the requirement was for two clamps at least six inches apart. The operator's maintenance foreman said no permanent solution was possible for pumps that were installed temporarily because they had to be detachable to be moved.

A fair appraisal of the testimony of the operator's maintenance foreman shows management was aware that miners "infrequently" engaged in the practice of "robbing" ground clamps and using one clamp to ground electrical equipment where the law required two. In fact, the parties' stipulated the operator had a history of nine prior violations of this standard in the 24 months preceding issuance of this citation. While the foreman was reluctant to admit personal knowledge of the practice, he did state that "once in a while," "not frequently," but "once in a while," he had seen wires clamped in a single ground clamp. He didn't take this lightly but said it was difficult to pin point responsibility.

The foreman's ready admission of the same problem on the permanent pumps when contrasted with his inability to how frequent it was on the temporary pumps cautions against ready acceptance of the view that the problem was hardly worthy of management's attention.

I conclude that even if the practice was "infrequent" management's awareness of the problem and its failure to take effective steps to insure compliance made out a case of aggravated negligence on its part. While control of the problem may have presented difficulties with respect to the temporary pumps, it was no excuse for tolerating the condition or turning a purblind eye to it. The circumstances of the violation are precisely those in which a civil penalty is most effective in encouraging voluntary compliance.

The inspector initially found the operator's negligence was "moderate" because he felt it was a problem that was difficult to control. But he did recognize, as did the witnesses, that the substitution of one clamp for two was a knowing and deliberate act. This in turn reflects a deficiency in the operator's safety training and enforcement program.

The evidence also showed that the violation could have resulted in anything from a lost workday or restricted duty accident to a fatality due to electrocution. The maintenance foreman's testimony that a fatality or other injury was unlikely because his experience was that derailment would cut both wires and thus break the circuit. He was not asked to address the problem of a short circuit due to vibration. The operator's ventilation fan was accompanied by the inspector, thought the wires were not twisted together and that if the clamp was dislodged the wires would be physically separate and thus break the circuit. The inspector and the walkaround were sure the wires were twisted together.

The citation merely recites that the two ground wires "was (sic) attached to the same clamp." The operator's foreman candidly admitted that whether the wires were twisted together was "immaterial" because the wires were "squeezed" together in the clamp and unless the manner in which the clamp broke released the "squeeze" the circuit would not break. On rebuttal, the inspector demonstrated (see G. 10) how one wire was twisted around the other before the wires were squeezed them together. I conclude that whether the wires were "twisted" or "squeezed" the hazard created was the same.

With respect to the S&S question, I find a derailment

contribute to a discrete hazard, namely that of a shock or electrocution. I further find that the likelihood of dislodgment was probable and certainly not so remote as to be inconsequential if normal mining operations continued.

Remoteness in time or space are undoubtedly important in determining whether an underlying violation could significantly and substantially contribute to a discrete and foreseeable hazard. But where, as here, the chain of causation (vibration or derailment) is direct and predictable and a hidden hazard could exist for an indeterminate time before abatement or injury, there is no merit in the contention that uncertainty as to the exact time of occurrence bars a finding of significant and substantial contribution.

The same reasoning applies to the claim that a dislodgment by derailment would almost surely sever the wires and break the lethal connection. In the inspector's contrary opinion, to which I give deference, it was "very likely" that the wires would remain twisted or squeezed and the circuit complete. Viewed from the standpoint most favorable to safety, I find that it was at least as probable as not that the circuit would not be broken and therefore the hazard was real. Because of its hidden nature it was certainly a hazard likely to occur before the operator would discover and voluntarily abate it. This condition like the well known booby trap is most likely to lurk until some unwary individual trips it.

As Prosser notes: "The defendant who set a bomb which explodes ten years later, or mails a box of poisoned chocolate from California to Delaware, has caused the result, and should obviously bear the consequences." Prosser on Torts, supra, p. 253. Here, of course, we are trying to forecast the likelihood of an adverse consequence and are denied the insight that comes from hindsight after an actual injury has occurred. Nevertheless common sense and unhappy experience show that either view reinforces the picture of a stage set for disaster for some unwary individual.

In my judgment, when an underlying violation sets the stage and provides a contributing cause of a major hazard its remoteness in time or space is irrelevant and immaterial. Compare, Consolidation Coal Company, supra, 6 FMSHRC 194 (Causative chain of a danger in a mine may have many links). The purpose of the law is to nip nascent hazards in the bud and not to find excuses for condoning them by trivializing the penalty.

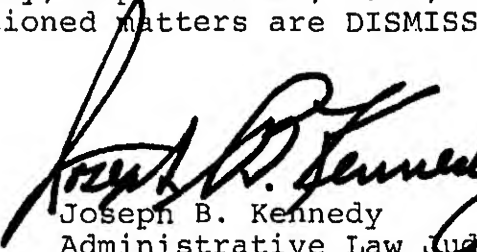
can occur with some other cause acting at the same time in combination with it results in a major mine safety. See, Hylin v. U.S.A., 3 MSHC 1020, 1028 (7th Cir. 1984) (MSHA's negligence contributed significantly and substantially to operator's negligence that resulted in a mine fatality to electrocution).

Because of the gravity and negligence involved, that the amount of the penalty proposed, \$119, was insufficient to insure management's prompt attention to a condition of practice that was resulting in a serious, hidden, potentially lethal mine hazard. To deter a violation that can occur only through a deliberate act of noncompliance with federal and state law, I assessed a penalty of \$750. A lesser penalty, I believe, would result in paralyzing on one hand what the Act seeks to promote with the other.

For these reasons, the exceptions to the bench decision are denied and the decision and the penalty assessed of \$750, are affirmed.

ORDER

Accordingly, it is ORDERED that the operator pay the penalties assessed, allocated as indicated, in the total of \$3,921 on or before Friday, September 28, 1984, and subject to payment the captioned matters are DISMISSED.


Joseph B. Kennedy
Administrative Law Judge

Attachment

Distribution:

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The Courier-Journal

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Mine safety agency bespatters its own im

BEST EFFORTS of Courier-reporters to investigate charges the U.S. Mine Safety and Administration turned up no to support claims that system-upton exists in the agency. 's not overly consoling. The e facts show a situation that is ginally better.

ports of writers Mike Brown f. Dunlop showed an atmos- which charges and rumors of ing were bound to arise, true or not. Mine inspectors r more talk from the higher-

ups about "cooperation" with safety law violators than about firmness are likely to feel that safety isn't the first order of business. When their citations frequently are thrown out or watered down — often without consultation with those who issued them — suspicions seem confirmed.

And when enforcement practices vary widely from one district to another — and even from office to office in the same district — either the efficiency or the integrity of the whole process is suspect. More than 53 per cent of citations in MSHA's Pittsburgh

District are classified and substantial," comp cent in the Barbourv doubtful that anyone b and other such disparities real sit- - - -

Coal

(703) 756-6210

RICHARD E. BJES,	:	DISCRIMIN
Complainant	:	
	:	Docket No
v.	:	
	:	Laurel Mi
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

ORDER

On June 15, 1984, the Commission issued its this matter affirming my decision that the compla Richard E. Bjes was discriminated against by the in violation of section 105(c) of the Federal Min and Health Act of 1977. The case was remanded to the purpose of determining the appropriate relief Mr. Bjes.

In response to my orders of July 27 and August the parties have advised me that they have reached as to the following compensation and awards due to

Back Pay.....	\$3451.10
Interest.....	1497.88
Expenses.....	172.93
	<u>\$5121.91</u>

Attorney Fees.....\$1375.00

In view of the foregoing, the respondent IS to immediately make payment to Mr. Bjes in the am above, and to immediately disburse and pay to the of record the agreed upon amounts as shown. Upon by the respondent in the amounts shown, these pro are dismissed.

James A. Korn

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